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DECISIONS
OF THE
COURT OF ARBITRATION
UNDER
"THE WORKERS' COMPENSATION FOR ACCIDENTS ACT, 1903."
VOL. III.
1904.

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DECISIONS c

UNDER THE

WORKERS' COMPENSATION FOR ACCIDENTS ACT

FILED FOR THE YEAR 1904

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VOL. III.

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Jan. 21, 1908.

C A S E S

UNDER THE

WORKERS' COMPENSATION FOR ACCIDENTS ACT

(From 1st January to 31st December, 1904).

FILED IN FEBRUARY.

MARLBOROUGH INDUSTRIAL DISTRICT.

(1.) HUMFFREYS v. MURRAY.—JUDGMENT.

In the Court of Arbitration, Marlborough Industrial District.—In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an arbitration between Charles Mostyn Humffreys, of Havelock, labourer, claimant, and Charles Frank Murray, of Wharanui, sheep-farmer, respondent.

UPON hearing Mr. Baillie, of counsel for the claimant, and Mr. McNab, of counsel for the respondent, and having duly considered the matter submitted to us, we do hereby order as follows:—

1. That the sum of £100, paid into Court in this case, be forthwith paid to Thomas Scott Smith, Esq., Stipendiary Magistrate at Blenheim, in the Provincial District of Marlborough and Colony of New Zealand.

2. That the said Thomas Scott Smith shall forthwith pay out of the said sum of £100 amounts as follows:—

(a.) To the claimant the sum of £15 7s. for funeral expenses and disbursements made by him, and also the sum of £5 for immediate requirements and maintenance of his infant children of the ages of five years and three years respectively.

(b.) To William Grey Hall Baillie, of Blenheim, solicitor, the sum of £7 6s. for costs, including disbursements £1.

(c.) The sum of 13s. for filing and sealing this order.

3. The balance of the said sum of £100 shall be held by the said Thomas Scott Smith, upon trust, to pay thereout to the claimant from time to time such sum or sums of money as he, the said Thomas Scott Smith, may, in his absolute discretion, think fit, for the maintenance of the two said infant children of the said claimant.

Dated at Blenheim this 10th day of December, 1903.

FRED. R. CHAPMAN, President.

FILED IN MARCH.

TARANAKI INDUSTRIAL DISTRICT.

(2.) THE PUBLIC TRUSTEE, FOR GEORGE LANGMAN, DECEASED, *v.*
ZIMMERMAN.—JUDGMENT.

In the Court of Arbitration, Taranaki Industrial District.—In the matter of “The Workers’ Compensation for Accidents Act, 1900”; and in the matter of an application for arbitration between the Public Trustee, administrator of the estate of George Langman, deceased, claimant, and Frank Zimmerman, respondent.

SPECIAL case stated for the opinion of the Arbitration Court, by agreement of the parties.

Langman was killed by an accident arising out of and in the course of his employment while working as a bushfeller for the respondent on the 9th February, 1903. He was employed at a wage of 1s. per hour, payable in respect of days and parts of days only on which he actually worked for respondent. The employment was terminable by either party at any moment.

The deceased commenced to work for respondent on Thursday, the 11th September, 1902, and worked for him continuously, in the sense that there were no breaks and he worked for no one else, until the day of the accident, which was a Monday. He thus earned in the months and broken months the following wages, which were paid monthly: 11th September to 30th September, £5 16s. 6d.; 1st October to 31st October, £8 6s. 8d.; 1st November to 29th November, £7 3s.; 1st December to 31st December, £7 0s. 6d.; 1st January to 31st January, £6 17s.; 1st February to 9th February, £2 12s.: total, £37 15s.

We do not find that any question arises out of the date of commencing and ending the week. Apparently the wages were paid to the end of each civil month according to the number of hours worked. The civil week, however, runs for the six working-days commencing with the Monday and ending with the Saturday. There were therefore two broken weeks, in one of which Langman worked three days, and in the other a day or part of a day. Apparently his average day only ran to between six and seven hours.

The question now is, how his average weekly earnings are to be computed. We have not been furnished with figures showing the earnings from week to week; only the wages earned in each calendar month are shown in the case. We infer from the circumstances that Langman had only worked for a few hours on the

Monday on which he was killed. Numerous difficult questions have arisen as to the interpretation of the expression "average weekly earnings." According to the circumstances, they have been based on the civil week or the factory week, or a week computed from the contract between the parties. An illustration of the class of difficulty which arises may be stated thus: If a man works for a week of six days at 8s. per day, his average weekly earnings are clearly 48s.; if the same man worked during the previous Saturday he earned 8s. in that week; and the question arises whether his average is still 48s. per week, or whether it is not one-half of 56s., because he earned that sum in two weeks. A somewhat similar, but not exactly similar, question arises if he works throughout the Monday of the next week, in which case he has earned 64s. in three weeks. This same question would, however, arise in a more acute form if, instead of the whole day, he only worked one hour on that Monday, making a total of 57s. still divisible by three.

We say that the question in the latter case is not exactly similar to that in the previous one, because in that case the 8s. earned in the first broken week cannot be extended by any consideration as to what the man might have earned, whereas in the latter case he might, but for the accident which caused his death, have gone on and earned wages to the end of the week. This discussion cannot be considered fantastic. In *Lyons v. Knowles and Sons (Limited)* (1901, A.C., 79), the deceased worked as a collier on Tuesday and Thursday, earning 6s. on each day. The colliery week commenced on Wednesday. The County Court Judge held that he had worked a week at 12s. per week; the Court of Appeal held that the Act only contemplated an average in the strict sense, arrived at after two weeks' working. The House of Lords held that the "average" was used in a looser sense, but that the collier had worked in two weeks, so that his average weekly wage was only 6s.

In this case deceased worked for twenty-one whole weeks at an hourly wage, his earnings for the week varying with the number of hours worked. He had previously worked a broken week, making twenty-two weeks. Then he entered a twenty-third week, and was killed on the Monday. The problem is to ascertain by what number we have to divide the sum earned to arrive at his average weekly earnings.

This raises the question how the last broken week is to be treated. So far as his contractual relation with the employer is concerned, he might be dismissed or might leave at an hour's notice. We do not think that this consideration wholly disposes of the question. In *Ayres v. Buckeridge* (1902, 1 K.D. 57), in the Court of Appeal, the position of the workman is stated by the Master of the Rolls as follows: "There were special terms arranged whereby he was to have work for sixty hours per week, and, having regard to the fact which further appears that he was living at the time at some considerable distance from this particular work, there is no doubt that special terms were made with him which raised the

inference that he was to be employed for a week, and made it probable that he would be continued in the employment at that rate. There is no doubt that he was liable to be discharged, and could discharge himself at an hour's notice, but still he was to be employed for a week. In fact, the deceased worked for four days including the day of his death." As we read this passage in the judgment we understand it to mean that the actual contract was the same as in this case, but that the Court in ascertaining the average weekly earnings was at liberty to consider the other terms stated as assuring the workman sixty hours per week—presumably at the same wage—and this entitled the County Court Judge to draw the inference that but for the accident the deceased would have worked the rest of the week at that rate.

This we treat as an authority for the proposition that in drawing the proper inference as to the average weekly earnings we are not bound to have regard merely to the letter of the contract, but that we are entitled to look at the surrounding circumstances and consider what it is reasonably probable that Langman would have earned during that week but for the accident. The case is in this respect very different from *Lyons v. Knowles*, where there was no ground for drawing any inference that the miner in question would have continued working.

There is nothing in the case to suggest that the work was giving out, or that there was any ground for anticipating a cessation of the existing relation between the parties. In these circumstances we think that there is no room for any other inference than that Longman would in all probability have earned in that week wages at the rate at which he had been earning them. One mode of computing these wages would be to establish that week's wage as a hypothetical wage by reference to the average of the twenty-one unbroken weeks, because the first broken week may be assumed to have been at approximately the same rate; but, as this might leave room for a minute error, we think that a more absolutely exact method is to reject the last broken week altogether, to deduct from the sum of £37 15s. the few shillings earned on that Monday, and divide the remainder by 22. This, we think, will give the average weekly earnings on the proper assumption—namely, that the average for the twenty-two weeks is ascertained by the history of the case, while the true inference from the facts is that on the Monday on which he was killed, and consequently in the week in which he was killed, Langman was earning wages at the same rate as the period which preceded it.

We do not think that this method conflicts with any cases decided in the English Courts. Apparently it does conflict with some Scotch cases: see *Peacock v. Niddrie and Benhar Coal Company* (4 Fraser [Court of Sessions Cases, 5th Series] 443; reprinted in *Weekly Notes*, 1903, page 162, followed by several other cases in the same volume of *Weekly Notes*). According to these cases, whenever the employment continues so that a new week is com-

menced the portion of the week worked has to be counted as a week. It seems to us that this results in the 365th day of the year counting as a week, and that, according to this mode of computation, the year must be deemed to contain fifty-three weeks.

In *Keast v. The Barrow Hæmatite Steel Company* (15, Times Law Reports, 141) it was held that the words "average weekly earnings" means the amount earned in a year divided by 52. We are not absolutely bound by the decisions of other Courts, and if we find them to be in conflict we must choose the course which seems to us the most reasonable.

The method suggested is rational and convenient, and is in accordance with the common-sense view that most people would take of the words to be interpreted. In *Lyons v. Knowles*, in construing the word "average," the House of Lords set aside the strict meaning of the word in favour of what might be termed a popular view of its meaning, feeling satisfied that the Legislature used it in that sense. We think that we are following this example.

Mr. Beven, in his admirable work on "The Law of Employers' Liability and Workmen's Compensation, third edition, 1902, page 379, lays down a series of rules as his view of the result of the cases. One of these rules is as follows: "(3.) Where more than a week's work has been done the sum earned during the week may still be taken as evidence of the average weekly earnings, and the additional day's work may either be rejected or taken as evidence of the daily increment to the building-up of the weekly sum." We approve of this rule, and, subject to a slight doubt as to whether we ought not also to have rejected the days of the first broken week and the money earned on those days, we decide to apply it here.

Answer: The average weekly earnings of the deceased are to be computed by deducting from his total earnings—namely, £37 15s.—the sum which he earned on the day on which the accident happened by which he was killed, and dividing the remainder by 22.

Dated 23rd January, 1904.

FREDK. R. CHAPMAN, J., President.

WELLINGTON INDUSTRIAL DISTRICT.

(3.) JOHN SMITH *v.* GRIFFIN.—JUDGMENT.

In the Court of Arbitration, Wellington District (Napier).—Under "The Workers' Compensation for Accidents Act, 1900."—John Smith, of Napier, labourer, claimant, *v.* John Griffin, of Napier, contractor, respondent.

THE claimant claimed in respect of an accident thus described: The vessel "Kate Tatham" was discharging coal on a stage, and

the claimant was loading coal therefrom into his dray. A basket of coal from the vessel in swinging out frightened the horse, who knocked down the staging and injured the claimant.

Mr. Westall appeared for the claimant.

Mr. Lusk for the respondent.

After hearing the evidence and arguments, we informed the parties of the conclusion at which we had arrived, and intimated our intention of putting our judgment into writing.

The facts were practically undisputed. The claimant, who is a general labourer, had been from time to time employed by the respondent, who is a contractor. He was sometimes employed at road-making, sometimes at other work, but his duties were always about the same, to fill and drive carts engaged in removing material of various kinds. On this occasion the parties met, and respondent asked claimant what he was doing. Claimant told him that he was going to shovel coal for the people who were unloading a collier then in the port. Respondent told him to get his (respondent's) horse and cart, and work at carting away the coal from the same vessel. Claimant started to do this, and was accidentally injured in the manner described soon after he went to work. He said that there was no arrangement as to wages, but that he usually got 7s. a day in respondent's service. He added that his reason for taking this work rather than the shovelling was that he knew that a carter was leaving respondent, and hoped to get his place. There was, however, no foundation for this hope. Respondent said that he always paid claimant 1s. per hour, and considered that he was hired by the hour. We adopt this view of the hiring. It was in evidence that when hired by respondent claimant's work often lasted some weeks, or even months.

We think that it is more than probable—almost certain—that claimant would have remained in respondent's service until this vessel was unloaded, but we find no ground for inferring that the hiring would have continued any longer. This distinguishes the case from that of *Public Trustee v. Zimmerman*, decided in January, 1904, in which we found that the claimant, a labourer hired by the hour, had every prospect of continuous employment for an indefinite period.

We recognise that in the case of casual labour care must be taken to draw the proper inference from the evidence as to the probable continuance of the work. The expression "casual labour" is open to more than one interpretation. We have recognised this in distinguishing the last-mentioned case from *Lyons v. Knowles* ([1901] A.C. 79), in which the engagement was so purely casual that no inference as to probable continuance could properly be drawn. This distinction was fully recognised by this Court under the presidency of Mr. Justice Cooper in *Reddie v. The Borough of Balclutha* (Reports of Decisions of Court of Arbitration, 1901–2, p. 13).

The collier in this case took three days to unload, and we think that it is reasonably certain that in that week, but for the accident, the claimant would have earned three days' wages at 8s. per day. This makes his average weekly earnings under this employer £1 4s. There was no dispute as to how long the effects of the injury would last. The award will be that 12s. per week be paid to the claimant by the respondent for fifteen weeks from the date of the accident, with £7 7s. costs, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards. These sums are to be paid one week after this date.

Dated the 5th February, 1904.

FREDK. R. CHAPMAN, J., President.

FILED IN APRIL.

WELLINGTON INDUSTRIAL DISTRICT.

(4.) ANDREWS *v.* GAMMON AND GAMMON.

In the Court of Arbitration, Wellington District, (Palmerston North).—Under "The Workers' Compensation for Accidents Act, 1900."—Richard Andrews, of Palmerston North, engine-driver, claimant, *v.* George Albert Gammon and William Alfred Gammon, of Dannevirke, sawmillers, respondents.

JUDGMENT OF THE COURT, 4TH MARCH, 1904.

THE claim was for compensation for injuries arising from an accident stated as follows: "Claimant, driving engine, got up to oil it, and owing to there being no guard-rail his finger caught on the guide-bar." The nature of the injury was stated to be "Tip of third finger of right hand crushed, and had to be amputated." It was alleged that claimant was unable to do any work except light work, that his earnings previous to accident were £2 14s. per week, and that since the accident the estimated average amount which he is able to earn is £2 per week since the 5th July, when able to work. The accident happened on the 9th May, 1903.

The case was a very unsatisfactory one. The accident was stated to have happened at respondent's sawmill on a Saturday at five minutes past 12, the mill hands having dispersed at a quarter to 12. A boy who was working with the claimant informed the respondent's manager that claimant was hurt, giving, however, no information as to the nature of the accident. All he said was, "Dick has got hurt again." The manager went to his house, and

saw him and his wife. Claimant then told him, as he now thinks, in the presence of claimant's wife, that he had hurt himself at his own house by letting his window-sash fall upon his finger. The manager believed this, and it seems to have been believed by the respondents' representatives until the hearing. Claimant gave an absurd reason for thus misleading the manager, but no sordid motive could be suggested for this. We think, despite this untruth, that the accident described in the claim really happened at the mill. The claimant appeared to be speaking the truth, and Dr. Graham, when called by the Court, expressed a very clear opinion that the nature of the injury to the finger was such as to render the present story probable and the former one highly improbable, and he gave other reasons for this conclusion. The boy had left the district, and could not be found. The remark made by the boy had reference to the fact that this was claimant's third accident. For the first he was compensated through an insurance company; the second had only affected him for a short time. For these accidents he blamed the engine, and the manager blamed him. We did not inquire into this dispute. At the time of the accident claimant was still suffering from the consequence of the previous one, but he was drawing his full wages, himself paying the boy £1 per week to assist him. He continued after the accident to draw his full wages until the 10th June, paying the boy to assist him in exactly the same way. It is quite clear, therefore, that at the date of the accident his earning-power was impaired, and that for the four weeks after the accident, tested by pecuniary results, it was not further impaired. We have only to consider the extent to which it was reduced by the effects of the accident, and we cannot say that during these four weeks it was reduced.

For the purposes of this case we assume that for both these periods his earning-capacity was £2 14s. per week. Dr. Graham stated that the loss of the tip of the third finger would not incapacitate the claimant after two months, and we accept this opinion. We have therefore only to deal with the effect of the evidence as to a second month from the expiry of the one for which the claimant was fully paid.

The claimant does not appear to have earned anything during that month; at any rate, his earnings do not exceed half his former earnings. We treat him as partially incapacitated during this period, and award him the sum of £5.

As the claimant's statement to the manager misled his employer, and probably caused this litigation, we allow no costs.

FREDK. R. CHAPMAN, J., President.

(5.) RINK *v.* NATHAN AND CO. (LIMITED).

In the Court of Arbitration, Wellington District (Palmerston North).—Under “The Workers’ Compensation for Accidents Act, 1900.”—Between Henry Rink, of Makino, carpenter, claimant, and Joseph Nathan and Co. (Limited), of Makino, butter-merchants, respondents.

JUDGMENT OF THE COURT, 4TH MARCH, 1904.

THE claimant alleged that he was injured by an accident arising out of and in the course of his employment, and that his spine was thereby affected. The accident happened on the 24th or 25th July, 1903.

Claimant, who was employed as a carpenter in respondents’ factory, stated that, having gone from the room where he was working to another room in the course of the performance of his duty, he was returning when his foot slipped on the edge of a small drain and went down into the drain, thereby causing claimant to fall backwards. He saved himself from completely falling by gripping the edge of a door with his hands, this door being somewhat behind him. The movement caused his body to twist. He felt a severe shooting pain about his back, which, however, ceased at once. He felt pain that night, but none next day. Afterwards the pain gradually increased, but he continued at work until the 8th August, when he took to his bed, and sent for a doctor on the 12th August. He was treated for gravel by more than one medical man. He or his father called attention to the history of the slight accident, but Dr. Johnson, the first medical man called in, took little or no notice of this, as he was satisfied with his diagnosis. This treatment was continued until the 15th September, when Dr. Graham diagnosed the injury now alleged and sent claimant to his private hospital, where he remained five weeks. The evidence leaves no doubt on our minds that claimant was suffering from spinal meningitis. Though some slight suggestions were made as to strains from dancing, and a fall while roller-skating, based on information supplied by claimant, these were too remote in point of date to be probable causes of this trouble. The substantial question discussed by medical experts was whether the injury was attributable to this accident, and there was a considerable body of medical evidence to the effect that a man could have worked as claimant did if he had suffered such an injury. Dr. Graham, however, had had cases of the kind, and satisfied us that this suspension of symptoms was neither impossible nor improbable. He was satisfied, moreover, that such a movement as that described by the claimant was a cause adequate to produce such an effect.

Here then we have an adequate cause not too remote from the manifestation of the consequences, and a sufficient intervening history to connect the two, while against this we have no suggestion of any other adequate cause. This, in a civil case, would entitle a

jury to find that the injury was caused by the accident described, and we think that a fair-minded jury would so find. We accordingly find as a fact that the injury was caused as alleged. There is no doubt that this was an injury caused by accident, within the meaning of the Act (*Boardman v. Scott & Whitworth*: 4 W.C.C. 1, 85; L.T. 502).

A further question was raised as to whether due notice of the accident had been given. In this connection it must be borne in mind that successive medical gentlemen had asserted that it was a case of gravel, and had treated claimant for gravel. In these circumstances we think that his own opinion and that of his father were so overborne by that of his medical advisers that we are entitled to excuse the delay in giving notice, unless there was further undue delay. A formal notice was only given on the 29th September, but formal notice is not necessary. On the 19th September Dr. Graham certified that claimant was suffering from localised spinal meningitis. Claimant had been removed to Dr. Graham's hospital three days before. Probably the certificate was the first specific information claimant received of Dr. Graham's diagnosis. The same promptitude is not to be expected from a lad in a hospital as from an older man in his own house. This certificate was transmitted to claimant's father, who seems to have given it to the respondents on the 21st September. The handing-in of the certificate gave sufficient notice of the accident. We think that reasonable promptitude was used, though no doubt the delay was somewhat hard on respondents.

In the result we find for the claimant.

In respect of the claimant's disablement he is entitled to recover £18 18s., with £7 7s. costs, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

FREDK. R. CHAPMAN, J., President.

NELSON INDUSTRIAL DISTRICT.

(6.) *McCARTNEY v. GRANT.*

In the Court of Arbitration of New Zealand, Nelson District, (Nelson).—Under "The Workers' Compensation for Accidents Act, 1900."—William McCartney, claimant, *v.* William Yates Grant, respondent.

JUDGMENT OF THE COURT, 4TH JULY, 1904.

THE claim was in respect of total disablement for nine weeks, less two-thirds of a week, and partial disablement for four weeks. The claimant's average weekly earnings were £2 per week, and during partial incapacity he was able to earn £1 10s. per week. A payment into Court had been made on the assumption that the respon-

dent was only liable for half the difference between the claimant's earning-power before the accident and that existing during partial incapacity.

That we are not bound by this measure is now made clear by several decisions. (See *Illingsworth v. Walmsley* (1900) 2 Q.B. 142; 69 L.J. Q.B. 519; 2 W.C.C. 118 ((C.A.); and *Phinix v. Brown and Geddes*, Decisions of Court of Arbitration, page 1.) Having regard to the admitted circumstances, and our unfettered discretion up to the statutory limit, we award the claimant £10 10s.

We have no jurisdiction to allow medical and other expenses claimed. We allow the claimant £3 3s. costs, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

FREDK. R. CHAPMAN, J., President.

FILED IN MAY.

WESTLAND INDUSTRIAL DISTRICT.

(7.) BARROWMAN *v.* THE NEW GREENSTONE GOLD-DREDGING COMPANY (LIMITED).

In the Court of Arbitration, Westland District (Hokitika).—Under "The Workers' Compensation for Accidents Act, 1900."—Thomas Barrowman (executor of Moses Barrowman, miner) *v.* The New Greenstone Gold-dredging Company (Limited), (David Larnach, Liquidator).

Mr. Joyce for claimant; Mr. Murdoch for respondent.

JUDGMENT OF THE COURT.

CLAIM for compensation under "The Workers' Compensation for Accidents Act, 1900."

The nature of the accident which caused the death was thus stated: "Deceased fell into dam where dredge was floating, causing his death by accidental drowning."

The sole question raised was whether the accident by which the deceased lost his life arose out of and in the course of the employment. The evidence left no doubt as to the circumstances. The deceased was an engine-driver and general dredge hand engaged in working a dredge belonging to the respondent company at Greenstone Creek. This dredge was employed in getting gold, and was worked exactly as dredges are worked on the west coast of the South Island and in parts of Otago. A dredge is worked by a crew of six, divided into three shifts of eight hours each. A shift always consists of two men, unless in an exceptional case where the dredge

has an engineer, and in that case he only comes on board during the daytime. The three shifts change in regular succession, so that night or day work is taken turn-about. Of the two men one is the winchman, while the other drives the engine and stokes the fire. The winchman who is in charge of the dredge can never leave his post without stopping the dredge. The dredgemaster takes his shift with the other hands, and in it acts as winchman. The engine-driver may leave for short periods when the circumstances require him to do so. When dredging is not in a river the dredge has to make a pool or dam for itself. This dam always remains about the same size, as the dredge scoops it out by means of the buckets, and at the same time fills it up with the spoil falling from the elevator or sluice-box, which gets rid of the tailings. The dam is usually very deep, according to the depth of the ground. As a watch or shift lasts eight hours, it is customary to take a short meal at the middle of the shift. As all colonial workmen drink tea with their meals, it may be taken as an understood thing that such a meal includes hot tea. The dredgemaster employed to manage this dredge had been a dredge hand, and knew the custom, and had himself regularly taken this meal. When a dredge is not working in a running stream the water of the dam becomes fouled, and carries as much clay as will remain in suspension in it. It is admittedly impossible to drink such water or to make tea with it. Some companies provide a bucket for fetching clean water from the nearest stream, but there was no such bucket on this dredge. The custom on this dredge was for a man to go ashore with the "billy" in which the water was boiled for the tea, fill it, and bring it on board to be boiled at the engine fire. This "billy" was the property of the crew. With unimportant variations the practice observed on this dredge was that observed on all dredges in the Greenstone district. The dredge was properly equipped, and had floating in the dam a proper boat as required by law. The dam was so small that it was only necessary for a man going ashore to moor the boat head and stern to make a bridge to the shore. On the 22nd April, 1903, the deceased was working in the watch from 12 until 8 a.m. At 4 a.m. the night was dark, and he left his fire to go and fetch water from a stream two chains from the dam. The watchman, thinking that he had been too long gone, went to look for him. He found that the boat had been moored to the herbage of the shore. The unfilled "billy" and the deceased's lantern, which was still alight, were in the boat. Further search revealed the deceased's cap floating in the dam near the boat. The body was subsequently found in water 30 ft. deep near to where the cap was floating.

We find as a fact—and as to this there can be no doubt—that the deceased met with an accident whereby he fell out of the boat and was drowned, and that this occurred during working-hours, when he was going ashore to obtain clear water to make tea for his mate and himself, in accordance with the usual and recognised

practice. The contest before us was whether in these circumstances it is open to us to find that his death was caused by accident "arising out of and in the course of the employment." The deceased was paid by the shift, or, more correctly speaking, by the hour.

We have no difficulty in holding that the accident arose in the course of the employment, as the thing that the deceased was doing was something recognised as being properly done during the hours of work; moreover, in a case like this, if we can properly find that the accident arose out of the employment, it almost follows that it arose in the course of it, though the converse would not be equally true.

The more difficult question is whether it arose out of the employment. It has frequently been observed that the words of section 6 are disjunctive and not conjunctive, and that it is incumbent on the claimant to prove fulfilment of both conditions.

The law has been stated generally in the following terms, which we think correctly express the result of the authorities: "The leading principles which have governed these decisions appear to be, firstly, that the accident must have arisen from a risk incidental to the work which it was the duty of the workman injured to perform, giving at the same time" [this statute being a remedial one passed in the interest of the workman] "a wide and liberal interpretation to the word 'duty'; secondly, that the accident must have occurred at a time when the relationship of master and servant may be fairly held to be subsisting between the injured workman and the employer." (*Ruegg on Employers' Liability and Workmen's Compensation Acts*, 6th edition (1903), 262.)

It has been decided that when a ticket-collector, having finished his work, stepped on to the footboard of a railway-carriage to speak to a friend, and thus met with an accident, he was doing something unconnected with his employment and for his own pleasure, and that the accident did not arise out of the employment (*Smith v. Lancashire and Yorkshire Railway Company*: (1889) 1 Q.B., 141; 68 L.J. Q.B., 51; 79 L.T., 633; 15 T.L.R., 64). This governs a whole series of cases. There is another series in which in a factory the workman injured was doing something intended to be in his employer's interest, but outside the scope of his duties, and consequently not in the course of "the employment" (*Lowe v. Pearson*: L.R. (1889), 1 Q.B., 261; 68 L.J. Q.B., 122; 79 L.T., 654; 15 T.L.R., 124).

The present case, however, stands on a different footing, and we have come to the conclusion that though it is very close to the border-line, the accident arose out of the doing of something incidental to the work which it was deceased's duty to perform, and so "arose out of the employment." The statute does not demand that the accident shall be caused directly by the performance or attempted performance of some duty imposed by the contract of hiring. It is manifest that "arising out of the employment" is a

much wider in expression, and is not intended to exact a very close connection in the nature of cause and effect between the employment and the accident; it is satisfied if in a fair sense it can be said that the one arises out of the other.

In the cases in which such claims are rejected as not arising out of the employment, the accident occurs at a moment in which the workman is doing something in which the employer is not interested, or else in doing something wholly unconnected with "the employment," though it may be that he is endeavouring in some other unsolicited manner to serve his master's interests.

It has been urged that here the deceased was doing something in which his employer was not interested, merely for the comfort of his mate and himself. We do not think that the employer was wholly uninterested in what the deceased was doing. It was interested in both men doing their work properly. The course of practice shows that it is considered that to this end it is reasonable and in a sufficiently accurate sense necessary that the men should take a slight meal in the middle of the shift. Included in this is the assumption that this meal shall comprise the customary items. We cannot split up the customary meal, and say that one part is necessary and another a luxury. In this colony workmen invariably drink warm tea with such a meal if they can get it. This involves obtaining wholesome water. It was urged that this might have been obtained in daylight. There may have been some slight negligence in not so obtaining it, but to do so a man would have had to come on board from his home, and then go back and get it, and this would in the same shift have sent a man ashore in the night unless the men of an earlier shift remembered to get it, and as the respondent company had provided no bucket to store water in through the night it may be fairly assumed that it countenanced this practice, which was known to the dredgemaster, of going ashore for water during the night. Even if this were less clear we should not consider that negligence falling short of misconduct affected the question once we had come to the opinion that the act of the deceased performed in some manner was one of such a character that an accident happening during the performance of it arose out of the employment.

The view that we have taken does not conflict with any decided case; on the contrary, it is supported by authority. In *Blovelt v. Sawyer* (L.R. (1904) 1 K.B., 271; 20 T.L.R., 105), a workman was employed in building a house. He was paid by the hour, the dinner-hour being excluded in calculating the number of hours he worked. He remained on the premises during the dinner-hour, and ate his dinner under a wall which he had been building, intending to resume work after the dinner-hour, when the wall fell upon him and injured him. It was held by the Court of Appeal that the accident arose out of and in the course of the employment. The principal question discussed was whether the workman was in the employment during the dinner-hour. The question whether the

accident arose out of the employment seems to have given the Court of Appeal little difficulty. The Master of the Rolls speaks of "the time occupied in coming, going, and stopping for any purpose ancillary to the applicant's work," and holds that the dinner-hour could be counted as part of the time to be used by the applicant for purposes ancillary to his work, as for example for eating necessary food. The case only differs from the present in a way favourable to the claimant, as here deceased was clearly doing something countenanced by the employer within working-hours. In *Keenan v. Flemington Coal Company* (5 Court of Session, 164), decided in 1903, a member left the pit-head where he was working to get a drink of water and was killed by a runaway hutch when he was returning. It was held that he was killed "in the course of employment" within the meaning of the Act. This implies a finding that the accident arose out of the employment. In an earlier case, *Goodlet v. Caledonian Railway Company* (39 Sc. L.R., 795), an engine-driver, having housed his engine, and having shortly to take it out again, crossed two sets of rails to a spot about 12 yards from his post to speak to another employee of the company. What he had to say to this employee was merely a casual conversation, lasting for a moment or two, having nothing to do with his duties as an engine-driver. On his way back to his engine he was knocked down by an empty train. The Court of Session held that the accident arose out of and in the course of his employment.

For these reasons we find that deceased met his death in such a way as to give his executor a claim under the Act. The sole dependent is deceased's daughter, aged sixteen, who was wholly dependent on his earnings. His average weekly wage was £2 8s. 2d. The amount payable is in this case fixed by the Act irrespective of the claim. We award the claimant, on behalf of Emma Jane Barrowman, the sum of £375 14s. with costs £7 7s., together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards, such sums to be paid by the liquidator within fourteen days after notice of this award.

Dated the 30th day of March, 1904.

FREDK. R. CHAPMAN, J., President.

(8.) *PENROSE v. POWELL AND SONS.*

In the Court of Arbitration, Westland District (Westport).—Under "The Workers' Compensation for Accidents Act, 1900."—John Penrose, of Westport, labourer, claimant, *v.* John Morgan Powell, Robert J. Powell, and George M. Powell, of Charleston, near Westport (trading as "Powell and Sons"), respondents.

Mr. Lynch for the claimant; Mr. Hanan and Mr. Cottrell for the respondents.

JUDGMENT OF THE COURT.

THIS is a claim for compensation for personal injuries under "The Workers' Compensation for Accidents Act, 1900."

The claimant was engaged in felling bush for the purpose of clearing land belonging to the respondents, for which he was to receive £3 per acre. The application was dated Westport, the 25th day of November, 1903, and was filed at Hokitika on the 28th November, 1903. It was served on respondents on the 11th December, 1903. The accident, which resulted in the loss of the claimant's left eye, happened on the 29th August, 1903. Statutory notice of the accident was served on the respondents on the 16th October, 1903. This made no reference to any claim for compensation.

A preliminary objection was raised that these proceedings for the recovery of compensation were not maintainable because the claimant had not made a claim within section 12, subsection (2), of the Act, which says that such proceedings shall not be maintainable unless "the claim for compensation with respect to such accident has been made within three months after the occurrence of the accident." This was met by the suggestions (a) that the filing of the application was a sufficient claim, (b) that the verbal claim had been made and that this was sufficient, and (c) that the respondents had by their conduct debarred themselves from this defence."

There has been much controversy as to what is meant by "the claim for compensation"; and this controversy has not been wholly closed by the judgment of the House of Lords in *Powell v. The Main Colliery Company* ([1900] A.C., 336; 69 L.J. K.B., 759). The views of leading text-writers are to be found in Beven on *Employers' Liability and Workmen's Compensation*, 3rd edition, Part iii, Cap. V., page 409; Ruegg's *Employers' Liability and Workmen's Compensation*, 6th edition, 347; and Minton-Senhouse on *Accidents to Workmen*, 2nd edition, page 143, cited by this Court in *Teale v. Stevens* (*Journal of Department of Labour*, 1904, vol. xii, page 45).

One question discussed is whether an application for arbitration fulfils the requirement of the Act as a claim for compensation. According to the judgment of the House of Lords, the claim for compensation is something apart from the request for arbitration, and is a claim sent to the employer. The effect of that decision, however, is to decide not so much that a request for arbitration cannot be a claim for compensation as that when a distinct and sufficient claim is made within the time limited by the Act there is no limit of time within which the proceedings to obtain arbitration must be commenced. It has, however, been pointed out by Mr. Beven that before there can be an arbitration there must be a dispute or difference, and it appears to us that if it is possible to rely on the claim made in the application for arbitration as a claim for compensation under the Act—and there is authority both ways as to this question—it ought to be shown to have been in some way treated as a claim made against or sent to the employer. In this view, and giving the highest value to the application that we can give to it, we must conclude that it is out of time, for, though filed

at Hokitika, a distant town, within the statutory time for making a claim, it was never heard of by the respondents until it was served on the 11th December, which was too late. We think that those authorities which, since the decision in *Powell v. The Main Colliery Company*, have countenanced the notion that such an application may be treated as *the* claim for compensation must be understood as referring to an application filed and served or brought to the notice of the employer within time.

Several contentions were put forward to get over this objection. These were to the effect that a verbal claim had been several times made within time, and that the respondents had by their conduct waived their right to claim compliance with the Act.

Assuming, as it has sometimes been assumed, that a verbal claim is sufficient, we think that it ought to be proved with reasonable certainty to have been explicitly made in such a sense that the employer must have understood it to be a claim so distinct that it could be referred to the Court in its then form, and that the Court ought not to be asked to spell it out from vague conversations. We have taken the whole of the evidence into consideration, and cannot find in the conversations deposed to by the claimant as having been held separately and quite casually with several members of the firm anything that reasonably suggests that he was making a claim such as they might there and then have asked to be referred to the Court. No amount was even mentioned, and the conversations all, or nearly all, related to the prospects of claimant's obtaining something from an insurance company which had agreed to indemnify the employers. Indeed, on one occasion, according to the evidence of Mr. John Powell, jun., "he said he didn't want to see us put in for it." Some of the conversations deposed to by the claimant were denied by the respondents with whom he said he had had them, and at best they were very vague. The nearest approach to a claim was in a conversation in which the above remark was made. After the receipt of the notice of accident signed by his solicitor, Mr. Lynch, which contained no trace of a claim, this respondent said to claimant, "So you are suing us." Claimant seemed to know nothing about it. John Powell said respondents had had a letter from Mr. Lynch. His evidence continues, "He said he had had no conversation at all with Mr. Lynch, but it was Mr. Bird (a mining agent). He said the company in Wellington had treated him with every kindness, and that the company told him we admitted no liability. I told him we had no correspondence whatever with the company." This witness says, "He never made any claim on us, or said anything to the effect that he made a claim on us." The evidence of the other respondents who took any part in the matter was to the same effect. With reference to a possible verbal claim, Mr. Ruegg at page 352 says, "Must such a claim, when arbitration proceedings have not been commenced, be in writing? Is it sufficient if an injured workman meets his master in the street and says, 'I shall want compensation from you for my accident,'

or words to that effect? This question is still open. In the course of the argument in Powell's case, the Lord Chancellor suggested that in his view such a claim for compensation must be made in writing, but this was an *obiter dictum* only. The point did not arise in the case, and the Lord Chancellor's words are not mentioned in the reports." If the claimant had said anything so precise as is here suggested we might have had to consider its effect, but no conversation has been deposed to of this nature, nor in the circumstances would one expect such a conversation to have occurred.

Then, as to the suggestion that the respondents have by their conduct precluded themselves from raising this defence, we find no evidence to support this. In *Teale v. Stevens* we dealt fully with this subject. Here the conversations were all either of a casual nature or had reference to applicant's prospects with the insurance company. They were held singly with different members of respondents' firm, who, being insured, were in no way interested in defeating or delaying applicant's claim, or indeed in diminishing its amount. These conversations can never have been regarded as business conversations in any sense.

It was in evidence that the insurance company which had taken the matter out of respondents' hands had paid the applicant a small sum and sent him to Wellington to have his eye treated, and had there asked him to call at their office. We are satisfied with the explanations given as to this payment. An injured eye is such a serious matter that the company at once takes the risk of sending the injured man to a place where special treatment is available, even before the question of its liability is investigated. This payment binds neither the employer nor the company, and any payments made to applicant by the respondents were made in the same way and not in acknowledgement of liability. This answer to the defence is not made out. We are therefore compelled to dismiss the claim.

When the matter came to be investigated it was disclosed that the claimant was not working for a weekly or daily wage, but was clearing bush-land at £3 per acre. The company then treated the claimant as a contractor, and not as a servant, and defended the claim on that ground, raising the defence of want of claim at the same time. We have had to investigate this claim, and have gone fully into the nature of the employment, and are satisfied that the claimant was not a contractor, but was felling an unspecified area of bush to clear the land for farming purposes at so-much an acre, and was doing this subject in all respects to the directions of the respondents. We are satisfied that claimant was a pieceworker merely, and that but for the defence of want of claim he would have been entitled to some compensation.

Application dismissed, with costs £5 5s., witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 12th day of April, 1904.

FREDK. R. CHAPMAN, J., President.

FILED IN JUNE.

AUCKLAND INDUSTRIAL DISTRICT.

(9.) TURNER *v.* BAILEY.

CLAIM for half average wages during incapacity caused through the bursting of a blood-vessel in claimant's leg, alleged to have happened while working for respondent in laying the keel of a schooner.

The case was dismissed, with £5 5s. costs, with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

(10.) QUINN *v.* THE KING.

CLAIM for 50 per cent. of average wages as compensation for an injury to both eyes, causing partial loss of sight, sustained while engaged in blasting operations at the Co-operative Works at Te Akaroa, near Helensville, on the 24th November, 1902.

The following is the order made in this matter: "Order that application be removed from the list of cases for hearing, with liberty to applicant to make a special application to the Court for leave to have the case reinstated in the list upon such terms as to costs or otherwise as the Court shall, on hearing such application, deem just, and with further liberty to respondent to apply on notice being given to the applicant to finally dismiss the application."

TARANAKI INDUSTRIAL DISTRICT.

(11.) AYRES *v.* HILL.

In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an arbitration between Alfred Arthur Ayres, of Hawera, factory employee, claimant, and Thomas Henry Hill, of Hawera, aerated-water manufacturer, respondent.

HAVING heard Mr. McCarthy, agent for claimant's solicitor, and Mr. Barton, of counsel for the respondent, and it being admitted that the claimant was injured on the 31st day of August, 1903, in the course of his employment as a worker employed by the respondent, and it being also admitted that the partial incapacity for work of the said claimant ended on the 14th day of October, 1903, and it being also admitted that the said claimant has already

received the sum of £10 on account of any compensation he might be entitled to: now, having considered the matter submitted to us (and by consent), we do hereby make our award as follows:—

1. We order that the respondent, Thomas Henry Hill, do pay to the claimant, Alfred Arthur Ayres, the further sum of £10 as compensation in full satisfaction of all claims and demands now or hereafter to arise out of the said personal injuries caused to the said Alfred Arthur Ayres on the 31st day of August, 1903, by the said accident arising out of and in the course of his employment as a worker employed by the said Thomas Henry Hill.

2. And (by the like consent) we do further order that the said Thomas Henry Hill do forthwith pay to the said Alfred Arthur Ayres, or his solicitor, Harry Caplen, the sum of £10 (hereinbefore ordered to be paid).

3. And (by the like consent) we do further order that each of the parties to this arbitration shall bear his own costs of and occasioned by the same.

Dated this 15th day of April, 1904.

FREDK. R. CHAPMAN, J., President.

THE following cases have been settled out of Court: Benness *v.* Souther, Kirk *v.* Colonial Sugar Company, Smith *v.* Laing, Wilson *v.* Taupiri Coal-mines (Limited), Overall *v.* Smeed and Others, Norris *v.* Leyland O'Brien Timber Company, O'Grady *v.* Waihi Gold-mining Company and Another, Savage *v.* Whakatane County Council, Brown *v.* Kempthorne and Co., Hill *v.* New Zealand Crown Mines Company, Francis *v.* Davidson, Polkingthorne *v.* The Waihi Gold-mining Company, Snodgrass *v.* George, Boryer *v.* Bailey and Lowe, Kissling *v.* Fraser and Sons.

FILED IN JULY.

NORTHERN (AUCKLAND) INDUSTRIAL DISTRICT.

(12.) ROBERTS v. THE RAGLAN COUNTY COUNCIL, AND JOHNSTONE AND JOHNSTONE.

In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an arbitration between David Roberts, of Hamilton, labourer, claimant, and the Chairman, Councillors, and Inhabitants of the Raglan County, and Campbell Johnstone and Lindsay Johnstone, of Okete, contractors, respondents.

HAVING duly considered the matter submitted to us, and the respondents herein having filed an admission of the liability to pay to the claimant the weekly sum hereinafter mentioned, and the claimant having filed an acceptance of the weekly sum so offered by the respondents, and neither party making any claim for costs, we do hereby make our award as follows:—

1. We order that the respondents, the Chairman, Councillors, and Inhabitants of the Raglan County and Campbell Johnstone and Lindsay Johnstone, do pay to the claimant, David Roberts, the weekly sum of 9s. 2d. as compensation for personal injury caused to the said David Roberts on the 26th day of February, 1903, by accident arising out of and in the course of his employment as a worker employed by the said Campbell Johnstone and Lindsay Johnstone in labouring, such weekly payment to commence as from the 25th day of April, 1904 (the same having already been paid by the respondents to the claimant for the period from the 12th day of March, 1903, to the said 25th day of April, 1904), and to continue until the same is ended, varied, or redeemed in accordance with the provisions of the Act.

2. And we order that, as from the said 25th day of April, 1904, the respondents do pay to the claimant the said weekly sum of 9s. 2d. at such periods as the claimant, the said David Roberts, may in writing direct.

Dated this 18th day of May, 1904.

FREDK. R. CHAPMAN, J., President.

(13.) SLEIGH v. NORTHERN UNION STEAMBOAT COMPANY (LIMITED.)

JUDGMENT OF THE COURT.

CLAIM for compensation under "The Workers' Compensation for Accidents Act, 1900."

The claimant is the father of the deceased. The accident was thus described: "Deceased was acting as engineer, and helping to navigate the ferry-boat 'Parora.' The deceased was apparently

struck by a case which was on the boat falling upon him, and he then fell overboard and was drowned."

Two defences were raised—(1) That the accident which led to the death of the deceased did not arise out of and in the course of the employment; and (2) that the claimant was not dependent on the said James Frederick Sleigh.

The accident happened on the 7th August, 1903, in the northern Wairoa River, off Aratapu. The master had met with an accident and the deceased was in charge of the steamer, which was moored at the Kauri Timber Company's wharf. A few minutes before 5 p.m. deceased apparently noticed an empty box or crate used for carrying produce which some one, without his authority, had put upon the deck-house of the steamer. He asked the master of the "Pilot" who had been putting cargo on board his ship (referring to the case). Nobody saw the man fall into the water, though witnesses saw him sinking. Apparently deceased crossed the deck of the "Pilot" to reach the "Parora," which was made fast to the "Pilot's" quarter alongside the wharf. He was seen in the water five minutes after the conversation referred to. It is certain that he got on board the "Parora" and came into contact with the box, which was seen in the water with him. We think that the proper inference from this evidence is that deceased went on board to do something in the interests of his employers, the owners of the vessel, and that while doing or attempting to do this he fell overboard. Not only is this the proper inference, but we think it is the only inference that can reasonably be drawn. It is, moreover, highly probable that he deemed it necessary to do something to the box—probably to shift it from its position—and that in doing this he in some way missed his footing and fell overboard, dragging the box with him, or else that it fell upon him and knocked him overboard. These latter conjectures are unnecessary, as the first inference involves the conclusion not merely that the accident happened in the course of but that it arose out of the employment.

As to the second question, we find no reason to doubt that the claimant is substantially correct in his statement that he was a dependant. He says that though he cannot give figures he estimates his son's contributions at 5s. per week. We do not find it necessary to determine the exact figure, but we have no doubt that these were substantial contributions to the father's cost of living, which was probably from 12s. to 15s. per week, and that the father relied on these contributions. Further, the son was liable to support his father in case of the latter's failure, and we think that the actual burden would have been an increasing one, as the father had bad health and his infirmity was increasing. Once the contribution and the facts of dependence are established we are at liberty to draw any reasonable inference as to probable continuance: *Simmons v. White Bros.* ([1899] 1 Q.B., 1005), *Main Colliery Company v. Davies* ([1900] A.C., 363). Had the father been wholly dependent on deceased he would have been entitled to something

over £300. We have a wide discretion up to the amount of the maximum in fixing the sum payable to the claimant (Beven on *Employers' Liability*, 3rd ed., 383). In exercising this discretion we have tested the question of amount in several ways, such as by estimating the fair cost of annuity of a certain amount, and by establishing the ratio between the son's contribution and the cost of the father's support on the one hand, and the amount we propose to award and the maximum claim on the other. Approximate figures only can be arrived at; but, taking into consideration the decision of the Court in *W. B. Reid v. Lady Charlton Company* (Decisions of Court of Arbitration, Vol. i, page 10) and *McCluskey v. Success Gold-dredging Company* (same volume, page 25), we think that £100 is a fair sum to award by way of compensation.

Order that within fourteen days from this date the respondent do pay to the applicant the sum of £100, together with £12 12s. costs, with witnesses' expenses and disbursements, including applicant's expenses as a witness, to be fixed by the Clerk of Awards.

FREDK. R. CHAPMAN, J., President.

27th May, 1904.

THE following cases have been settled out of Court: *Middlebrook v. Bond Bros. and Judd*; *Smith v. The Colonial Ammunition Company*; *Smith and others v. Riddle Bros.*; *Finlayson v. The Buller Junction Gold-dredging Company*.

FILED IN AUGUST.

NORTHERN INDUSTRIAL DISTRICT.

THE following cases have been settled out of Court: *Tierney v. Wigg*; *Middlebrook v. Bond Bros.* and another.

WELLINGTON INDUSTRIAL DISTRICT.

THE following cases have been settled out of Court: *Flood v. Kirkpatrick and Co. (Limited)*; *Larking v. Handyside, Roberts, and Co.*; *Campbell v. McAlister*.

FILED IN SEPTEMBER.

WELLINGTON INDUSTRIAL DISTRICT.

THE following decision was given in the Supreme Court, Wellington, on the 11th and 23rd March, 1904. Judgment delivered by Cooper, J.:—

(14.) WILLIAM ASHCROFT v. CABLE AND CO.

Workers' Compensation for Accident—Assessment of Compensation—Part-dependent—Reasonable and Proportionate to the Loss or Damage—Costs of Unsuccessful Action under Deaths by Accident Compensation Act.

Where the deceased, besides paying £1 per week to his parents for board and lodging, also contributed money towards the expenses of the family when his father was out of work, *Held*, That the parents were partial dependants of the deceased worker.

The sum of £200 was allowed by the Court as the "reasonable and proportionate compensation" to which the plaintiff was entitled, but ordered that the costs of an unsuccessful action under the Deaths by Accident Compensation Act should be deducted.

Mr. Young appeared for the plaintiff, and Mr. Jellicoe (and Mr. Weston) for the defendants.

COOPER, J.—This action was tried before me by a special jury on the 26th February, 1904. It was an action for damages under "The Deaths by Accident Compensation Act, 1880," and the Employers' Liability Acts.

The son of the plaintiff was on the 17th September, 1903, killed in the defendants' foundry while in the service of the defendants, by an accident arising out of and in the course of his employment. The jury found a verdict for the defendants, and judgment for the defendants was accordingly given with costs on the higher scale.

The plaintiff thereupon, under section 9 of "The Workers' Compensation for Accidents Act, 1900," applied to the Court to proceed to assess compensation under that Act, and the application was heard by me on the 11th March instant.

It was proved that the plaintiff was in part dependent on the earnings of his son, the deceased, but the defendants contended that only a nominal amount should be assessed.

The deceased had been five days in the employment of the defendants as a journeyman boiler-maker at the wage of 10s. per day. His average weekly earnings in their employment was therefore £2 10s. per week, he having entered their employment on a Monday, and having been killed on the succeeding Friday. He had previously been in employment at Luke's foundry, at which he had served his apprenticeship, and for some time after the period of apprenticeship had expired, and until a fortnight before his death, had remained in such employment as a journeyman at the daily wage of 10s.

The family consisted of the plaintiff, his wife, the deceased, and other children, some of whom, including the deceased, were earning wages and paying various amounts to the plaintiff, and receiving board and lodging, &c., the family living together in a house belonging to the plaintiff at Petone. The deceased contributed regularly £1 per week, and received board and lodging and underclothing, and his mother paid his lodge fees and insurance premiums. The plaintiff had for some time prior to his son's death been in casual employment as an engine-driver. There were intervals when he was out of employment, sometimes extending for five or six weeks, and during such intervals the deceased gave towards the general household expenses a further sum of £1 per week.

The compensation to be paid to a part-dependant under the Workers' Compensation Act is not to exceed 156 times the average weekly earnings of the deceased where the deceased has been for a less period than three years in the employment of the person from whom compensation is sought, and it is to be reasonable and proportionate to the loss or damage suffered by the part-dependant. The principle on which the compensation in such a case is to be assessed has been discussed in a number of cases, the principal of which are *Main Colliery Company v. Davies* (1900, L.R., A.C., 358) and *Howells v. Vivian and Sons* (85 L.T., 529). In the latter case the Court of Appeal followed the rule laid down by the House of Lords in the former case—that if the deceased paid his wages to his parents, and they received them and depended on them as part of their income or means of living, then partial dependency was proved, and held that it was no answer to a claim based on partial dependency that the family might be able to support life without the contributions of the deceased, the real test being whether they depended on such contributions as part of their income or means of living.

In the present case it is clear that the £1 a week paid regularly was used as part of the income of the family for the common support of the family, the deceased receiving as a member of the family board and lodging and washing and some underclothing, and also on his own account lodge dues and insurance moneys amounting to about 4s. or 5s. a week. The extra £1 a week contributed when the plaintiff was out of work was also a material part of the income on which the family as a whole was maintained, and by the death of the deceased both these sources of income have been lost.

It is difficult to lay down any definite rule as to the meaning of the words "reasonable and proportionate to the loss or damage suffered." The amount to be assessed must depend on the circumstances of each particular case. In this case I am satisfied that the plaintiff has, by the loss of his son, suffered a substantial pecuniary injury, and that his means for supporting the family as a whole have been appreciably diminished.

Taking all the circumstances of the case into consideration, I am of opinion that a fair sum for compensation, reasonable and pro-

portionate to the loss sustained, is the amount of £200. The funeral expenses were paid from the fund for that purpose contributed by the lodge, and I have not therefore taken them into consideration.

The deceased's life was insured for £200. This is not an element to be considered. In *Pryce v. Penrikyber Navigation Colliery Company* (85 L.T., 477; 4 W.C.C., 115) the Court of Appeal held that moneys coming to a dependant on the death of a workman were not to be considered in estimating the compensation to be assessed to a claimant under the Workman's Compensation Act. The principle of the decision in that case applies to insurance moneys as well as to other moneys.

Under section 9 of our Act, the Court in such a proceeding as the present one is at liberty to deduct from the compensation all the costs which in its judgment have been caused by the plaintiff bringing his action at law instead of proceedings under the Workers' Compensation Act. As I consider that if the plaintiff had proceeded under the Workers' Compensation Act he would have been entitled to the sum of £200 compensation, and as the costs of the action in the Supreme Court have been caused by his election to proceed in the Supreme Court instead of the Arbitration Court, the defendants' costs as between party and party of that action ought to be deducted from the gross amount assessed by me. I assess the compensation payable to the plaintiff at the balance of the sum of £200 remaining after the amount of such costs has been ascertained by the Registrar. When this has been done the Court will give a certificate in accordance with the provisions of section 10 of the Act.

(15.) HEATH v. UNION STEAMSHIP COMPANY (LIMITED).

THE following decision *re* Compensation for Accidents was given *In the Supreme Court of New Zealand, Canterbury District*, and is inserted by the courtesy of His Honour, Mr. Justice Denniston:—

Heath, Appellant, v. The Union Steamship Company (Limited), Respondents.

JUDGMENT OF DENNISTON, J.

On the 18th July the appellant, while in the service of the Railway Department, was injured by the negligence of the servants of the Union Steamship Company, the respondents. On the 22nd August the appellant's solicitor made a claim on the respondents, who at once repudiated liability. On the 6th October he issued the summons in the present action, which was heard on the 16th November. The Magistrate found negligence proved and assessed damages at £60, but gave judgment for respondents on the ground that appellant had "proceeded against" his employers (the Railway Department) within the meaning of these words in "The Workers' Compensation for Accidents Act, 1900," section 16, and was there-

fore barred from proceeding against the respondents. On this point, the facts stated by the Magistrate were these: The accident took place on the 18th July. Appellant forthwith gave notice in writing to the Stationmaster under whose control he was at the time the accident occurred, and gave weekly reports of his condition to his superior officer. Such notices and reports were made at the special direction of such officer. Prior to the 14th August, appellant received three weeks' accident pay at £1 per week. On the 14th August, appellant requested in writing that "the question of accident pay remain dormant for a few weeks." On the 16th October he issued the summons in the present action. On the 8th October his solicitor wrote to the Manager of the Railways: "Mr. J. Heath, who met with an accident in July last while discharging timber from the 'Waikare' into the railway-trucks, has been in, and has asked me to write to you and request that you will obtain for him the weekly allowance to which he is entitled in consequence of having met with the accident. He understands it is £1 a week, and has asked you some time ago to let it remain in abeyance; but as he has need of it now he will be glad if you will let him have it." On the 8th October, he signed a voucher in a form which was headed "'The Workers' Compensation for Accidents Act, 1900,' and its amendments," and in which the amount was stated to be charged "to compensation while incapacitated for work through accident sustained while employed as a casual labourer" on the day of the accident. The actual voucher was not produced, nor was the amount received proved at the hearing or stated in the case. It was, however, argued that the whole amount obtainable under the Act was received. On these facts the Magistrate found the special defence proved, and gave judgment for respondents.

On the appeal, appellant's counsel stated that the finding of the Magistrate that the appellant had, prior to the 14th August, received £3 as three weeks' accident pay, though justified by the evidence, was not correct, the statement having been made by a witness who had ascribed a payment to another man as to the appellant; and it was stated that evidence to that effect would be found in a file of papers from the Railway Department, which the Magistrate had forwarded as part of the case and to be available for reference. A statement as to the mistake I have mentioned does appear in a letter on that file. But the file was, as I understand it, put in to explain, but not to negative, any finding by the Magistrate; and I intimated that I could not assume the statement in the letter to be correct, nor could I send back for amendment a case which correctly stated the facts as proved in the Court below. I intimated, however, that if required I would hold over the appeal until the plaintiff could apply for a rehearing. Since the hearing the matter has been investigated, and counsel for respondent has informed me that he is satisfied the mistake did occur as alleged, and that, in fact, no payment in respect of the accident was applied for from the Department until the 8th October—that is, after the issue

of the summons against the respondents. There is a voucher (unsigned) on the file (to which I am entitled to look for information not inconsistent with any actual finding of the Magistrate) showing that appellant received in all from the Department £11 2s. 11d., and that £1 16s. 8d. of the total amount he could recover remained unpaid.

The Magistrate, in his reasons for his judgment, states that "as the facts in the present case show that the plaintiff deliberately claimed and accepted compensation specifically named as being under the statute, he is precluded from bringing this present action." These words were written on the assumption, now admitted to be erroneous, that the appellant had so claimed and accepted compensation before bringing the present action. It is unnecessary for me now to consider the case from this point of view, as I have by consent to deal with it on the facts now before me and independent altogether of the Magistrate's judgment.

The section on which the defence is founded is in these words: "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof independently of this Act, the worker may, at his option, proceed either against that person to recover damages independently of this Act or against his employer for compensation under this Act, but not against both; and, if compensation is paid under this Act, the employer paying the same shall be entitled to be indemnified by the said other person." This section is identical with section 6 of the English "Workmen's Compensation Act, 1897," except that in the latter Act the words are, "may at his option proceed *at law* against that person," while the words of our Act are, "may at his option proceed against that person to recover damages *independently of this Act*"—these last words being in the English Act inserted after the words "damages in respect thereof" earlier in the section.

The section in the English Act was the subject of discussion in *Oliver v. The Nautilus Steamship Company (Limited)* (89 L.T., p 318). The facts of the case were stated by Jelf, J., in terms none of which were dissented from by the Court of Appeal. The plaintiff sued the defendants for injuries caused by the negligence of their servants. The negligence was admitted, and damages contingently agreed on. The defence was the 6th section, which, as I have said, is substantially the same as that relied on here. The plaintiff, within a few days after the accident, gave the necessary notice of the accident to his employers. He knew of the existence of the Workers' Compensation Act, and that, to get compensation under it, notice was required, and in sending the notice he (the Judge) says, "Meant to put himself right that way." Between six and seven weeks after the notice the officer of the office in which the employers had insured plaintiff against accident paid him £4 13s. 4d., being the maximum sum which he could then have

obtained under the Act. He signed a receipt from his employers, per the insurance company, for the amount received "on account of compensation which may be or become due to me under 'The Workmen's Compensation Act, 1897,' in respect of the accident which occurred to me on the 26th day of November, 1901." Some days later he received another pound for the week then due, and signed a similar receipt for that sum. The learned Judge then proceeds, "On that occasion, however, I find as a fact that the plaintiff having been so advised by the local delegate of his trade-union, gave the agent to understand that he took the money 'without prejudice.' The agent did not acquiesce in or dissent from this, but made a note of the fact, and informed the insurance company thereof. The plaintiff, however, kept the money, and received the £1 per week in like manner up to and including the £1 due on the 29th May, signing similar receipts each time. I find, also, as a fact, that the insurance company intended to pay the compensation under the Act, and that the plaintiff intended to take it under the Act; but that the plaintiff tried, after the first occasion when he got the £4 13s. 4d., to keep open any other remedy if he could." Ultimately, after receiving in all £23 4s. 3d., the plaintiff, on the 29th May, said he had been advised not to take any more money, and declined the £1 tendered, and thenceforth no payments have been made. The action was brought against the defendants on the 5th June. There was no evidence of any formal claim for compensation, in writing or verbal, against the employers or the insurance company. On these facts Jelf, J., gave judgment for the defendants, holding that plaintiff "exercised his option to go against his employers for compensation, and is therefore debarred from going also, at common law, against the persons who have, by negligence, rendered themselves liable to the plaintiff for the damages which might be recovered against them."

In the Court of Appeal the Lords Justices (Williams, Romer, and Stirling) reversed this judgment. Williams, L.J., says, "The sole question in this case is, has Mr. Oliver received compensation from the employer under 'The Workmen's Compensation Act, 1897'?" In coming to the conclusion that he did not do so, the Lords Justices rely entirely on the fact that all the payments except the first were received "without prejudice." The counsel for defendant on the appeal is stated by Williams, L.J., to have admitted this and to have accepted the proposition that if there had been no first payment made without being subject to this expression "without prejudice" he really could not have supported his case. In so doing the learned counsel must have felt unable to contend for the correctness of the short ground on which the learned Judge in the Court below met the point—that is, by the observation that the attempt of the plaintiff, while taking money under the Act, to keep open any other remedy if he could—was "an abortive attempt to contract himself out of the Act." The Court holds that the receipt by an employee of money calculated in terms of the

Act which he had no claim to except under the Act and which he acknowledges in all his receipts to be received "on account of compensation which may be or become due to me" under the Act, is not a bar against a third party whose negligence caused the action, if when receiving the money the employer says he receives the money "without prejudice"; although, in the words of Williams, L.J., "if there is a receipt and payment of money under the Workmen's Compensation Act, and that receipt is in no way qualified, I think that is sufficient to bring the case within the operation of section 6 and put the workman in the position of a man who has proceeded against his employer for compensation and recovered it." That is to say, the words "without prejudice" prevent it being a proceeding under the Act, and consequently a bar to proceedings against a third party. The point does not, however, arise in this action. Williams, L.J., explains it thus: "Here there was an agent who was standing in the shoes of the employer, and who might be expected to act in the same way that an employer, taking an interest in his workmen, might be expected to act—that is to say, come to the man lying in a state of suffering, as he then was, and say, 'You are entitled under the Act of Parliament, if you claim compensation, to receive each week a sum of money bearing the statutory proportion to your wage. Here it is, take it, and take it without prejudice; which means leaving you exactly in the same position as if you had not taken it, and not binding you to retain the money in any way if you, upon rising from your sick-bed, should think it better not to accept this money from me, your employer, under "The Workmen's Compensation Act, 1897," but elect to take the remedy against the other person who has the legal liability described in the 6th section of the Act.'"

The case is an authority, binding on me, that what took place in the present case is a receipt and payment of money under the Act, and sufficient to bring the case within the operation of section 16, unless this result is prevented by the fact of the plaintiff having, before the first payment, issued the summons in this action. In considering this we have to ask what construction is to be put upon the words "proceed against" in section 16. There is, as far as I can ascertain, no authoritative decision on the point. In the *Nautilus Company Case*, Jelf, J., puts as the sole question in the case, "Has the plaintiff proceeded against his employers under the Act within the meaning of section 6 and so determined his election and debarred himself from bringing the present action?" He answers the question in the affirmative, and, if I may say so, all his observations are well worth consideration. He treats the acceptance of compensation as sufficient, and, as I have before mentioned, disposes of the "without prejudice" as an abortive attempt by the plaintiff to contract himself out of the provisions of the Act; adding that he had taken the first payment without even making this attempt. I need not refer to the grounds on which the Court of Appeal have held that the absolute and unconditional re-

ceipt on this first payment can be brought within the subsequent proviso to the latter payments "without prejudice." Mr. Justice Jelf then holds, with the Court of Appeal, that acceptance of a payment from an employer under the Act is a proceeding which bars an action; but he does not say what is not a proceeding. Lord Justice Romer does not give a direct opinion on the point. He says, "In the first place let me point out that under section 6 of 'The Workmen's Compensation Act, 1897,' it cannot, I think, be said that a workman must necessarily be held to have exercised the option given to him by that section as against his employers or as against the stranger liable, because he has taken some proceedings either at law against the stranger or under the Act against his employers. Whether the proceedings would in fact be such as to bind the workman must depend upon the circumstances of each case, including a consideration of what has resulted from the proceedings, and whether or not any injury will result if the proceedings are held not to irrevocably bind the workman." That is a definite ruling on the point. It is, however, not necessary for the decision. He proceeds, "Further, I should like for myself to say that, in dealing with any particular case, I should try to look at it as a matter of substance, and decide it on the substance rather than on matters of form. I will further add that, as at present advised, though it is not necessary for me to express a final opinion for the determination of this case, I am disposed to think that proceedings should not be held to irrevocably bind the workman unless those proceedings have resulted in some compensation as such having been paid to and received by the workman so as to bind the parties." This last observation would also conclude the present point. It is, however, only an opinion, but one, of course, entitled to great weight. Stirling, L.J., says on this point, "I desire to abstain from expressing any opinion as to what might be held to be the true meaning of the word 'proceed' in the 6th section of 'The Workmen's Compensation Act, 1897,' only saying that it seems to me that great weight should be attached to the judgments which have been delivered in the Irish case of *Beckley v. Scott and Co.*" I shall refer to that case later. In *Tong v. Great Western Railway Company* (18 T.L.R., p. 566) all that was determined was that where there was actual recovery of compensation under the Act, an action could not be brought against a third party to recover damages for the same injury.

That case and the *Nautilus Company* case are the only cases I have found or been referred to directly dealing with section 6 (section 16 in New Zealand). There have, however, been several decisions on the construction of subsection (2) of section 1. That provides (subsection (b)) that, when the injury was caused by the negligence of the employer, his civil liability was not to be affected, but in that case the workman "may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act; but the employer

shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act." There is a further provision (subsection (3)) that when an action is brought against the employer for negligence, and it is determined that the employer is not liable in such action, but is liable under the Act, the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, subject to deduction for costs of the action. Under these provisions the Court of Appeal, in *Edwards v. Godfrey* ((1899) 2 Q.B., p. 333) held that where a workman brings an unsuccessful action against the employer he must, if he desires compensation to be assessed, follow the procedure prescribed by subsection (4) of section 1, and if he does not do so cannot at a subsequent date initiate fresh proceedings against the employer for arbitration under the Act. *Smith, L.J.*, held that the Act gave the workman an option of bringing a common-law action or resorting to the procedure under the Act; and that, having brought the action and failed, his claim to compensation was limited to the right given by the subsection. In the course of his judgment he says, "As I read section 1, subsection (2), (b), it gives to the workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself: this seems to me to be the clear meaning of the subsection. The respondent has availed himself of the right given him by that subsection; he has exercised his option in favour of bringing a common-law action which has failed." These words were very much relied on by the dissenting minority in *Beckley v. Scott and Co.* ((1902) Ir. Rep., K.B., p. 504). In that case the plaintiff instituted in the Recorder's Court (Ireland) proceedings for compensation under the Workmen's Compensation Act. The Recorder dismissed the application on the ground that the workman, not having been employed for at least two weeks, was not within the Act. This judgment was given on the authority of two decisions of the Court of Appeal in England. These were subsequently overruled by the House of Lords, but the decision of the Recorder and its grounds remained on record and unappealed - from. The plaintiff then brought his action in the superior Court in respect of the same injuries as were the subject of the proceedings in the Recorder's Court. It was held in the King's Bench Division by three Judges to one, and in the Court of Appeal by two Lord Justices to one, that the proceedings in the Recorder's Court were no bar to the action in the superior Court. The only defence in the superior Court was that the plaintiff had exercised his option by taking proceedings under the Act, not, it was said, in any sense a defence of *res judicata*. *Wright, J.*, says, "The option is not final; compensation is what is looked for." And, later, "I am of opinion that the intention of the Act of Parliament is clear—namely, that compensa-

tion shall not be given twice over." Barton, J., grounds his decision to some extent on the ground that if the plaintiff is outside of the purview of the Workmen's Compensation Act he cannot be said to have exercised his option under that Act. "If," he says, "he is outside the Act, is he not outside for all purposes, and can any of its provisions apply to him?" Gibson, J., dealing with the provision that the employer shall not be liable to pay compensation both independently of and also under the Act, says, "The expression is 'liable to pay,' not 'liable to be sued.' If election to proceed by one remedy necessarily and finally excludes the possibility of the other remedy afterwards, this provision against double compensation is redundant, and has no substantive operation." Later, he says, "What the section contemplates is apparently a successful proceeding, and it does not—in express language, at least—deal with a claim failing." And he concludes, "The explicit prohibition of double compensation is inconsistent with a notion that an incompetent, abortive, and fruitless proceeding can be a bar, or that election of one remedy, irrespective of results, necessarily excludes the other." In referring to section 6 (16, New Zealand) he does, however, observe, "The section prohibits concurrent proceedings by action and claim"; but adds, "but it does not expressly attach to the failure of a proceeding against one person incapacity to proceed against another." Boyd, J., in his dissenting judgment, declines to accept the construction that the workman might take proceedings in both tribunals, but could only recover compensation in one. In the Court of Appeal, Fitzgibbon, C.J., in dealing with section 6, refers to the express prohibition, but also to the fact that the indemnity of the employer is only "if compensation be paid under the Act." Walker, L.J., observes that the provision against double payment was natural and reasonable, but its existence was only consistent with double remedy. Holmes, L.J., in dissenting from the opinion of the majority of the Court, put the gist of his opinion in these words: "As I understand the English language, when an option is given to a person to take either of two courses he cannot take both; and, as I understand legal principle, an option or election of this kind once exercised must be adhered to."

I must say that on first impression, and before carefully examining the cases, I was inclined to adopt the words I have just quoted, and to hold that any act unequivocally indicating an intention to adopt one of the two remedies mentioned in the section, is an exercise of the option and irrevocable. The cases I have cited show, however, that there is a strong weight of judicial opinion against any such literal and uncompromising construction of the section. In *Powell v. Main Colliery Company* (1900, A.C., p. 366), Lord Halsbury makes some observations on the Act generally. He says, "It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of any

lawyer, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, 'I claim so-much,' and that then he should go to the County Court Judge and say, 'Now, please, hear my case, because my employer will not give me what I have claimed.' It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is why it avoided any technical phrases." That case determined that the "claim for compensation" in subsection (2) of section 1 means not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of claim for compensation sent to the employer. The Lord Chancellor, in dealing with the words "take proceedings" in the section he was discussing, says it was admitted by all the learned Judges who had discussed the case that the word "proceedings" was used in a sense different from that which would describe legal procedure ordinarily. In the *Nautilus Company* case there had been no claim for compensation. (The giving the notice of the accident prescribed under section 2, subsection (1) (New Zealand), section 12, subsection (1), is, of course, only a preliminary precaution, and cannot be called proceeding against any one.) The insurance company, as the agent of the employers, had sought out the workman and offered him the money. But his acceptance was held both by Jelf, J., and the Court of Appeal, as (but for the qualification "without prejudice") a proceeding against the employer for compensation under the Act, and as barring an action against the third party. It is therefore clear that "to proceed against an employer for compensation" has been interpreted to cover a friendly payment initiated by the employer. This, indeed, is said by Jelf, J., to be the intention of the Act. It shows, however, a very wide and liberal construction of the words: as Romer, L.J., says, looking at the substance and not at the form. Is it consistent with this way of looking at the Act to hold that a workman who, as the Lord Chancellor says, it is assumed, may be acting without legal assistance, must be held to have irrevocably committed himself to an option by taking any step definitely indicating an intention to begin to recover against one or other of those liable? We have against this view the very distinct opinion of Romer, L.J., which I have quoted. Although the Irish case is not exactly in point, yet the reasoning and language of most of the Judges is in the direction of treating the merely taking some step towards recovering damages or compensation as not irrevocable. In the Scotch case *Ryan v. McLellan* (2 Fraser's Scot. Sess. Cas., 5th Series, p. 387), quoted by Jelf, J., Lord McLaren says, "It is perfectly plain that compensation under 'The Workmen's Compensation Act, 1897,' and under the Workmen's Liability Act are mutually exclusive. If a workman accepts compensation under the one he necessarily waives his rights under the other. Now, in so far as appears from evidence in writing, the pursuer has accepted payments under the Workmen's Compensation Act, and

so it would appear that he had elected to take compensation under that Act."

In the *Nautilus Company* case one payment (the first) was made without any qualification, and, standing alone, would have been, in terms of the judgment, a bar to the subsequent action. But their Lordships held that in accepting the reservation as to subsequent payments the agent of the employers "agreed really that the qualification was to override the whole of the receipts." That is in effect, the plaintiff asked, and the employer consented, that the original payment under the Act should be treated as withdrawn or cancelled, and treated as made, like the other, conditionally, and not under the Act. That certainly assumes that even a payment is not "irrevocable"—that it depends upon the circumstances of each case. The judgment indeed goes further, and decides that there may be an actual receipt of moneys, which the workman can, by an agreed condition to that effect, treat at his option as either final against the employer, or provisional, leaving him his remedy against the third party, subject (apparently) to his liability to repay it to the employer.

I think, therefore, that, looking at the strong expressions in the House of Lords as to the non-technical and non-formal manner in which this Act has to be interpreted, and at the construction judicially put on the words "proceed against" in the section now in question and in other sections, I must hold that these words do not mean the taking legal or formal action, or even any isolated step towards such action; but that in all cases a Court must look at the substance and not the form, and that nothing short of taking, or agreeing to take, or recovering compensation or damages, irrevocably binds the workman so as to bar him from his alternative right to recover from the employer or third party as the case may be. There is a suggested result from the language of the section which may have a bearing on the question:—It begins thus: "Where the injury was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof independently of the Act," the workman may at his option proceed against the employer or such person, but not against both. But if the workman sues a person other than the employer, and fails because such person is shown not to have incurred any legal liability for the injury, does the section apply? It does not say "shall proceed against a person whom the debtor may think liable," but "who is liable." In that view of the section it would surely be a very rigid construction to say that a workman was bound to proceed with a claim which he may, subsequently to issuing a summons, have discovered or have been advised to be unsustainable. This view would support the opinion expressed by Gibson, J., in *Beckley v. Scott and Co.*, that an incompetent, abortive, and fruitless proceeding cannot be a bar.

In the very recent case of *Taylor v. Hampstead Colliery Company* (20 T.L.R., p. 166) a Divisional Court (Wills and Kennedy,

JJ.) has held that a workman who has received compensation for injury by accident under a certified scheme agreed upon between the employer and his workman under section 3, subsection (1), of the Act of 1897 is not precluded by section 1, subsection (2), (b), from bringing an action under "The Employers' Liability Act, 1880." That, however, was on the broad ground that compensation under such scheme was not compensation received under the Act, and therefore not within the words of section 1, subsection (2), (b). The proceedings under these sections deal entirely with double claims against employers. The decision is based on the particular language of subsection (1) of section 3, and has no bearing on this case.

On the law as stated by the *Nautilus Company* case the plaintiff can only succeed in the present action by establishing that he was not entitled to receive the moneys which had been paid as compensation by his employer under the Act. Doubtless, if that be so, the employer would be entitled to recover it from him as money paid without knowledge of the fact which barred the right to recover the compensation. But if he succeeded in this suit the result would be that he would practically have done what section 16 was obviously intended he should not do—obtain payment under the Act while retaining his common-law remedy against the third party.

The indefinite and confusing language of the Act—which is practically the same as the New Zealand Act—has been commented on by several Judges, and has been described by Lord Davey—*Lyson's Case* (1901, A.C., p. 95)—as "extraordinarily badly drawn." I do not in the face of such a conflict of judicial opinion pretend to have arrived at the conclusion I have expressed with confidence or certainty.

The appeal will be dismissed with £10 10s. costs.
(Decision given 6th May, 1904.)

FILED IN OCTOBER.

CANTERBURY INDUSTRIAL DISTRICT.

(16.) SYKES *v.* JOHN HAMMETT.

In the Court of Arbitration, Canterbury District.—William Sykes, claimant, *v.* John Hammett, respondent.

Mr. Widdowson for claimant; Mr. Joynt for respondent.

JUDGMENT OF THE COURT.

THE applicant, a joiner, aged twenty-five, working as an improver for respondent at £2 2s. per week, was, on the 1st October, 1902, injured "whereby his right hand suffered loss of fourth finger, part

of second finger, and of top joint of thumb; shortening of first finger, and third finger being rendered stiff and useless." The respondent at once commenced paying the applicant £1 1s. per week, and has paid it ever since, but it was not always quite regularly paid. The application for arbitration was filed after a delay of thirteen days in making such payment. Though the respondent paid these sums, and there was a good deal of correspondence, respondent had never explicitly acknowledged his liability, or undertaken to go on paying them. In his claim applicant claimed as follows: "12. Amount claimed as compensation, . . . £300." Exception was taken to the claiming of a lump sum by the answer, and the applicant then filed an amended claim claiming £1 1s. per week. Negotiations had taken place between the applicant through his father and the Government Accident Insurance Office, which may be taken to represent the respondent, for a settlement on the basis of a lump-sum payment.

The injury was, of course, permanent, and the result of the evidence, in our opinion, showed that the claimant could not with advantage work at his trade. During the period of a year and nine months since the accident he had practically done nothing beyond the light work about his father's house and garden, and had earned nothing, though beyond the permanent injury caused by the loss of fingers he was in good health, and even the injured hand was healthy and of some use.

Mr. Joynt urged that no dispute had ever arisen to justify the claimant in taking these proceedings, and that they were merely instituted as a lever to bring about a lump-sum settlement. It was admitted that the claimant was anxious to obtain such a settlement as would enable him to enter into business as a furniture-dealer, in which his father was engaged. We overruled this objection for reasons into which, in view of the result at which we arrive, we do not think it necessary to enter.

Incidentally the question was discussed as to whether a claim was valid which claimed a lump sum. The circumstances of this case render it unnecessary that we should decide this point, but it may be pointed out that the form of application in use would tempt an inexperienced person to claim a lump sum, that this view is further encouraged by the Legislature in the amending Act of 1903, section 3, which fixes the limits of a Magistrate's jurisdiction by reference to a lump sum, while it is evident that no person could well be prejudiced by this form of claim. It is, however, objectionable, and ought to be avoided. (See Bevan on Compensation, 3rd ed., 419.)

We suggested that the best way to regard this case would be to treat it as a claim, and at the same time an application to reduce the weekly sum. Considering the whole of the evidence, we think that the claimant has not done as much for himself as he might have done. Had he had no parental home to fall back upon, he would certainly have exerted himself more than he has done here while he

was waiting for a lump-sum settlement, to which he is not entitled. We are of opinion that he might fairly have earned £1 10s. per week, and we settle his future payments on that basis. This will not reduce the total sum to which the claimant is entitled as a maximum.

There will be a declaration of liability. The payments will be at the rate of £1 1s. until the end of the week in which this judgment is delivered. Thereafter the claimant will receive payments at the rate of 12s. per week until the amount is redeemed, ended, diminished, or increased in accordance with the provisions of the Act. As we consider that the claimant was unnecessarily precipitate in commencing proceedings we allow no costs.

Dated this 10th day of August, 1904.

FREDK. R. CHAPMAN, J., President.

THE following cases have been settled out of Court: *Cox v. Moore Bros.*; *Thompson v. The Shaw, Savill, and Albion Company*; *Hinks v. G. F. Wright*; *Martin v. Graham and Greig*; *Dickens v. The Geraldine Road Board*; *Gibson v. Lane and Co.*; *Zimmerman v. Suckling Bros.*

OTAGO AND SOUTHLAND INDUSTRIAL DISTRICT.

(17.) KEITH *v.* THOMAS SPAIN.

In the Otago and Southland Industrial District.—In the matter of “The Workers’ Compensation for Accidents Act, 1900”; and in the matter of an arbitration between Robert Keith, of Dunedin, labourer, claimant, and Thomas Spain, of Ida Valley, farmer and hotelkeeper, respondent.

HAVING duly considered the matter submitted to us, we do hereby make our award as follows:—

1. We order that the respondent, Thomas Spain, do pay to the claimant, Robert Keith, the weekly sum of 19s. 3d., as compensation for personal injury caused to the said Robert Keith, on the 1st day of July, 1904, by accident arising out of and in course of his employment as a worker employed by the said Thomas Spain in farm-work, such weekly payment to commence as from the 1st day of July, 1904, and to continue for twelve weeks from such date.

2. And we order that the said Thomas Spain do forthwith pay to the said Robert Keith the sum of £7 11s. 6d., being the amount of ten such weekly payments, calculated from the 1st day of July, 1904, until the 9th day of September, 1904, less the sum of £2 1s.

already paid, and do thereafter pay the said sum of 19s. 3d. to the said Robert Keith on Friday of every week, until the 23rd day of September, 1904, on which day the last payment is to be made.

3. And we order that the said Thomas Spain do, within fourteen days from the date hereof, pay to the Clerk of Awards, for the use of the claimant, his costs of and incident to this arbitration, which we assess at the sum of £7 4s.

Dated this 12th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(18.) SEED *v.* JOHN SOMERVILLE.

In the Court of Arbitration, Otago and Southland District (Milton).
—Between Mary Jane Steel, claimant, and John Somerville, respondent.

Mr. D. Reid for claimant; Mr. Sim for respondent.

JUDGMENT OF THE COURT.

THE claimant claimed compensation under "The Workers' Compensation for Accidents Act, 1900," in respect of the death of her husband, which took place on the 18th July, 1903. She claimed that she and her son, who was born on the 5th July, 1903, were wholly dependent on the deceased.

The deceased was a ploughman in respondent's employ at a regular wage. He entered the service on the 1st December, 1900, at a weekly wage of £1 "and found," and was in the service down to the day of his death, receiving latterly £1 2s. 6d. "and found." He served sixty-five weeks at the former and seventy-two at the latter wage, and the accident occurred ten days before his death. The value of his meals, as commonly rated in the district, is equal to 10s. per week. There was no evidence beyond statements of the deceased as to the accident having happened to him in the course of his employment. The evidence, if these statements are to be relied on, was explicit and consistent. Five days after the occurrence Dr. Sutherland, who was in attendance on deceased's wife, saw a wound like an brasion at the root of the left forefinger, the size of a sixpence, and asking deceased how he got it, was told that he was effecting some repairs to a plough and struck it with a hammer. Two days earlier, on Saturday, the 11th, he drew his father's attention to it, explaining that he gave it a knock by striking at a nut on the plough and missing his blow, explaining the occurrence in such a way that the father, a farm labourer, understood what he was doing when it occurred. The respondent saw him on the 11th, when he made no complaint about his hand; but on the next day, Sunday, the 12th, he had his hand tied up, and on being asked why, said he had hurt it at the plough, and explained that he had tied it up as he thought the frost had got into it. After his death respondent heard the particulars as to what happened at the plough from deceased's father. All these statements, excepting that to

Dr. Sutherland, were made when neither the deceased nor any one else attached the smallest significance to the injury; and even on the day on which he told the doctor this the latter did not realise the seriousness of the case, still less did the deceased recognise it.

Apart from these statements, there was no evidence whatever that any such accident had happened. We admitted this evidence provisionally, and subject to objection. There can be no doubt that according to the rules of English law strictly applied this evidence would be inadmissible to prove the main issue in this case affecting the respondent (Taylor on Evidence, 8th ed., par. 567), though it would probably be admissible as part of the history of the case were it important in connection with the question when and by what means the wound was received and septic matter introduced into it, as it then might be considered relevant to the inquiry into deceased's symptoms and the cause of them (Taylor on Evidence, par. 580). It would not be material, however, to such an inquiry to connect the respondent with the origin of these symptoms. In Scotland the rule is otherwise, evidence on the relation of others being admitted when the relator is since dead and would if living have been a competent witness (Dysart Peerage Case, L.R. 6, Appeal Cases 489). It is said that the reason is that in Scotland Judges, not juries, determine the facts as well as the law (Taylor on Evidence, 586), and they are apparently credited with a faculty for determining the real value of such evidence and applying it or not, according to whether they consider it of value or not.

By section 8 of "The Workers' Compensation for Accidents Act, 1900," the question of liability "shall be settled as an industrial dispute by the Arbitration Court under the Industrial Arbitration Act." The powers of the Court in hearing such a dispute are extensive, and, as to the admissibility of evidence, they are expressed in section 77, subsection (10): "The Court may accept, admit, and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal evidence or not." A very important question arises in this case, and may at any time arise, as to how far the Court ought to act upon this wide power in extending the general law of evidence. The law of evidence, though often adversely criticized, consists of a body of rules based on the experience of Courts and lawyers, determining what may and what may not be safely relied on as proof of any given fact; and in discussing the admissibility of any given piece of evidence it must generally be borne in mind that if it is safe to admit it, it is right to act on it. We do not propose to detract from this body of rules, but, having this discretion vested in us, we think it incumbent upon us in all cases where evidence is required beyond that admitted by the general law to inquire whether what is proposed can be safely relied on. There are instances in which, under the general law, unsworn testimony is admitted, such as the well-known case of entries made by a servant in the course of his business, the declarations of persons who know that they are dying, and other

instances; besides statutory extensions such as that which admits the entries of bankers' books in proof of the matter contained in them. These exceptions rest on the improbability of such statements being false and the great probability of their being true; and this is largely because it is not probable that they have been made in view of the litigation in which they are tendered as evidence. In the first-mentioned case there is no sort of reason for the servant making a false entry, while it would probably prove inconvenient to him were he to do so. In the second case, in our nationality, at least, the solemnity of the occasion is considered to warrant the truth of the statement. In the third case, and other cases of statutory extensions of the law of evidence, the entries are made, checked, and audited in such a way as to render them probably true.

We think that similar considerations and somewhat analogous reasons apply to this case. A simple question is put respecting what is then considered an unimportant injury. A simple and probable answer is given at a time when there could not have been in the mind of the person giving it the remotest idea that a pecuniary claim would arise out of the occurrence. We think that, without detracting from the safe and necessary rules of law respecting the admission of hearsay evidence, we ought to admit this evidence on the ground that the circumstances are such as to negative all idea of its being manufactured for any purpose connected with this claim, and to render it highly probable that the statement was in each instance a true answer to the question put. We have dealt at some length with this question, as we think it important that we should thus explain our reasons for using our discretionary power in the direction of an isolated extension of the ordinary rules of evidence, a power which we ought only to exercise with great caution. Evidence of this class should only be admitted where full effect can be safely given to it, and, having admitted it, we are satisfied to give full effect to it, and find accordingly that the accident which caused a wound on deceased's finger was an accident arising out of and in the course of his employment.

Several defences were raised: It was suggested that no notice of the accident was given to respondent pursuant to section 12 of the Act, and no claim was made within six months. The respondent, however, had, within a few days after the accident and while the deceased was still in his employment, acquired from deceased a sufficient knowledge of the occurrence to render it impossible that he should be prejudiced by the failure to give a more formal notice: while on the 12th October a formal notice of the accident and an explicit claim for compensation were made in writing by the claimant's solicitor. It was explained that this claim was not made sooner because, under orders from her doctor, the fact of her husband's death had been concealed from the claimant for nearly three months. The explanation does not, however, appear to us to be necessary, as either the notice was sufficient, or it may and ought to be dispensed with, and the claim was made in time.

We have now to consider whether it is proved in a reasonable sense that death was caused by "personal injury by accident" within the meaning of section 6 of "The Workers' Compensation for Accidents Act, 1900."

The claimant was confined on Sunday, the 5th July. The accident to deceased happened on Wednesday, the 8th. About the 9th she became very seriously ill. On Wednesday, the 8th, Mrs. Whitehead, the claimant's monthly nurse, became too ill to get up, but she had complained that she felt unwell on Monday, the 6th. On Friday, the 10th, she was so ill that she was removed in a conveyance to the manse, deceased assisting to carry her out of his house. She developed erysipelas, and died on the 20th or 21st. The doctor thought that this might have begun on the 6th, or that she might have then had influenza, which rendered her more susceptible to erysipelas. The wife's illness was puerperal fever, not erysipelas; but the evidence was that the same class of germ might cause puerperal fever and erysipelas. This, however, must be treated as doubtful. In this case we consider it immaterial. Deceased's father lived next door, in a house only 20 ft. away. He was taken ill without premonition on the 31st, and his case proved to be erysipelas; but he recovered. Deceased had a rag on his finger on the 9th, but in answer to his wife's inquiry said it did not feel sore. His first complaint was on Saturday, the 11th, to his father. It then looked "red and watery." On Monday, the 12th, he stopped in his father's house, and said he was going to have a bad finger. Dr. Sutherland first saw it on that day. He thus describes the progress of the case: "By the time I saw it on the Monday there was considerable inflammation, extending into the whole hand. I treated it. I told him to poultice it. On Tuesday I saw that inflammation was spreading up the arm. I lanced the back of the hand to prevent it spreading. In spite of the local antiseptic treatment, the whole arm got rapidly worse. Patient got rapidly worse from day to day. Blood-poisoning set in, and affected the whole system. I saw him daily until Saturday, when he died." This was Saturday, the 18th.

It was insisted by the respondent that these facts left it in doubt as to whether the deceased's death was connected with the wound, and that they pointed to the probability that he had taken erysipelas when assisting to remove Mrs. Whitehead from his house, and that thus, even if it was taken through the wound, the erysipelas was a new cause and the true cause of death. Several medical works of authority were referred to: Sir F. Treves, in his *Manual of Surgery* (1889), Vol. i, page 137, says that a special feature of erysipelas is its proneness to attack the wounded. "It assuredly frequently appears," he says, "without apparent breach of the surface"; but he adds that many consider that a breach of the surface at the point of origin, however small, always exists, and mentions that some authorities consider that the presence of wounds produces a proneness to the disease, to the reception of which a

wound is not actually necessary. "It is," he adds, "yet undecided which view, if either, is correct, and perhaps the question is incapable of solution. But the fact that the traumatic form begins at the wound and spreads outwards seems to imply that the *materies morbi* has been there received." Bristowe, in his *Theory and Practice of Medicine* (1887), page 300, defines it as "an acute inflammation of the skin originating for the most part in the neighbourhood of wounds or sores, attended with much redness and infiltration and severe febrile disturbance, and characterized by a marked tendency to spread over the surface and (especially in the presence of wounds) to become contagious." W. Watson Cheyne, in *Allbutt's System of Medicine*, says, "This contagious nature has now been conclusively proved, and that the disease originates almost invariably in connection with slight wounds or abrasions is generally admitted." This author questions the suggestion that erysipelas may give rise by contagion to puerperal fever. He recalls that it was formerly not uncommon in ill-ventilated surgical wards or such as were sanitarily defective. These several authorities appear to us to agree that, while erysipelas is a contagious disease taken into the system from outside, there is always a strong presumption that it is taken in by means of a wound or abrasion, however small; so strong, indeed, that the question whether it can be received without a wound is disputed, while its reception by the wounded is a constant experience. No wound or abrasion is known to have existed in the cases of Mrs. Whitehead and the elder Seed, but their existence is not negatived; therefore, though these cases give support to Sir F. Treve's statement as to the apparent occurrence of such cases without apparent breach of the surface, they do not negative the result at which all these authorities arrive as to wounds being the common means of access of the germs of this disease to the human body.

We think that the proper inference to draw from this evidence, from the history of the case, and from the local symptoms, is that the deceased took erysipelas through the wound, and that a conclusion to the effect that he took it in any other way would be against the weight of evidence.

From one point of view this conclusion is that which we were invited by counsel for the respondent to draw, as, while insisting that it was not proved that the wound was the source of trouble, he also argued that deceased took the disease from Mrs. Whitehead, and that it is probable that he took it while assisting to carry her out of the house. We think that it is extremely probable that the disease which ran through the family began with Mrs. Whitehead, and that in the small overcrowded house it became a source of danger; that even if the case of the wife be rejected as having a different origin, it spread to deceased, and ultimately in some unexplained way to his father.

The ultimate question then is whether, assuming this view of the course of the contagion to be correct, it is made out that within

section 6 of the Act the cause of death was "personal injury by accident." To bring the case within the words creating the liability a direct connection between the accident causing the wound and the death of the deceased must be shown, and the conclusion which we have formed on this subject is based upon the assumption in respondent's favour, that the disease may have been taken when carrying Mrs. Whitehead out of the house, thus attaching but little importance to the circumstance that this leaves but the bare minimum time for the incubation of the disease, especially if the father's evidence as to the appearance of the wound on Saturday be noticed.

We think that we are entitled to view the question somewhat broadly, and in this way: Deceased received a wound on the 8th, which ultimately became the means of introducing erysipelas into his system; that he did nothing in the way of introducing a new cause, and that all his acts prior to his fatal illness were such as, looking at his family surroundings and mode of life, might reasonably be expected of him; that, though the introduction of the erysipelas and his death from that cause was an unexpected result of the wound, the proper question is, did death result from that accident? and the proper answer is, that in all probability it did. This is the way in which the issue is put in *Dunham v. Clare* (1902: 2 K.B., p. 292; 86 L.T., p. 75), where the actual difficulties were greater than here, and it is the issue which we think the Legislature intended should be answered.

We need not minutely examine the cases of remoteness in actions of tort; they would not assist respondent, and they do not turn exactly upon the same case. The rule in case of tort is thus laid down by the Supreme Court of the United States in *Milwaukee Railway Company v. Kellogg* (94 U.S. (4 Otto), p. 469): "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Would the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application." See, on this subject, *Hill v. New River Company* (9 B. and S., p. 303), *Smith v. London and South-western Railway Company* (L.R., 6 C.P., 14), *Beven on Negligence* (2nd ed., p. 93 *et seq.*, on "Casual Connection").

In all the circumstances we are satisfied that there was not in the proper sense a new and independent intervening act or cause here, but the events follow in natural sequence; that the death was caused by the accident, and that therefore the claimant is entitled to succeed. The case is one of total dependency, and the Act fixes the amount of the compensation, under clause 1 of the Second Schedule, at 156 times the average weekly earnings of the deceased. The award will be for £244, which we award that the respondent pay to the claimant and for the benefit of the claimant and her

infant child in the following manner: The sum of £94 is to be paid to the claimant herself for the support of herself and her child. The sum of £150 is to be paid to the Public Trustee, to be invested by him and held by him upon and subject to the following trusts: Out of the interest and principal of the said sum the Public Trustee shall make to the claimant for the support of herself and the maintenance and education of her child such monthly or quarterly allowance as he shall think fit, with power upon the application of the claimant to vary the said allowance, and with further power upon the like application to pay over to her any such lump sum as he may at any time think likely to prove beneficial to her and her child; and in the event of the death of the claimant before the said sum is exhausted, the Public Trustee shall administer the balance in such manner for the benefit of the said infant child as he shall think fit, and all parties, including the Public Trustee, shall have the liberty to apply for advice and directions to this Court respecting the said sum as they may be advised.

The respondent will also pay the claimant £15 15s. for her costs, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 13th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(19.) HYNES v. JOHN MCCARTHY.

In the Court of Arbitration, Otago and Southland District (Milton).
Between Philip Hynes, claimant, and John McCarthy, respondent.

Mr. D. Reid for claimant; Mr. Sim for respondent.

JUDGMENT OF THE COURT.

CLAIM under "The Workers' Compensation for Accidents Act, 1900."

In the filed claim the deceased, Michael Hynes, who was the son of the claimant, was described as a general labourer employed by respondent, and the nature of the work on which the deceased worker was then engaged and the nature of the accident were thus described: "Driving a six-horse loaded wagon belonging to respondent. The wagon capsized, and a portion of the contents—to wit, three bags of coal and one bag of barley—fell upon deceased." It was then stated that death was caused by suffocation due to the weight of the bags on deceased's chest. The accident happened on the 19th September, 1903.

The defences raised were: (a) a denial that the accident arose out of the employment, and (b) serious and wilful misconduct.

It was part of the duty of deceased to drive the wagon in question, and it was shown that he was a competent wagon-driver. It is necessary to state the history of the case in detail. On the 19th

of the road where it was perhaps not altogether unsafe to place an inexperienced man in his seat, and he never gave any directions to his substitute. His recumbent attitude is not one which suggests that he was fighting against the inclination to sleep, or that he was bent on retaining control.

We do not find that authorities assist us, as the decided cases vary very much in the facts, and all differ from this case; but we come to the conclusion that the deceased had so far placed himself out of control that an accident happening not while he was "driving," as alleged in the application, but while another man was driving and he was resting and, as it happened, sleeping, was not an accident arising out of the employment, whatever may be said as to its being in the course of the employment.

We are not called upon to decide what the conclusion would have been had the deceased accidentally gone to sleep while in the driver's seat in charge of the wagon, and an upset had been thus brought about. It is quite conceivable that sleep brought on through no fault of the driver and due to the nature of the duty imposed upon him, to excessive hours of work, or to some other cause arising out of the performance of his service or obedience to instructions, might be deemed to be the commencement of an accident giving rise to a compensation claim. That, however, is not the kind of case with which we have to deal. The true cause of the accident was the error due to ignorance of driving and want of knowledge of the locality made by the man in actual charge in pulling the horses out of the road in endeavouring to follow Harding. The onus of making out his case being on the applicant (*McNicolas v. Dawson*—1899, 1 Q.B., 773; 15 T.L.R., 242), we do hold that he has not satisfactorily shown that the accident arose out of the employment, and dismiss the claim.

As to the affirmative defence of serious and wilful misconduct, we think it unnecessary to decide how far it is made out by the above facts.

As to the costs, we think that they should be adjusted on the footing of the respondent having succeeded in the case but having failed to prove his affirmative defence of serious and wilful misconduct by means of witnesses as to drinking. We therefore disallow him the expenses of the witnesses called to support this defence, and which raised a distinct issue, and by way of making some allowance to the applicant for the cost of bringing witnesses to meet it we allow less costs than we should have otherwise allowed. The claimant will pay £7 7s. costs of the defence, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 13th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(20.) SHIELDS *v.* JOHN MILL AND CO.

In the Court of Arbitration, Otago and Southland District (Dunedin).—Between Edward Shields, claimant, and John Mill and Co., respondents.

Mr. Platts for claimant; Mr. Sim for respondents.

JUDGMENT OF THE COURT.

THIS is a claim under "The Workers' Compensation for Accidents Act, 1900," in respect of an accident to claimant, which happened on the 18th March, 1903, and is thus described: "Working in hold of ship 'Silverstream' stowing wool when a bale of wool was discharged from the wharf-crane down the hold of the vessel and struck the claimant, jamming him against the ship's side." The injury is thus described: "Severe bruise hip and lower part of spine, resulting in permanent stiffness and pain, which prevents the claimant from bending and stooping, and thus incapacitates him from following his usual occupation." He alleged total incapacity of permanent duration. He claimed £1 10s. per week, and alleged "Notice not served owing to mistake of claimant." It was alleged that claimant had received £29 in respect of the injury.

Several defences were set up, including (a) denial of total incapacity and permanency, (b) want of notice, (c) claim not made within three months, (d) that the amount of compensation was fixed by agreement at the sum of £29, which was duly paid to the claimant, who signed a release and discharge for the same on the 8th October, 1903.

We find as a fact that such a release was signed with a full knowledge of its meaning and effect, and with the intention that it should operate as an agreement fixing the amount of compensation and as a discharge of the respondents. We think it necessary to state the grounds of this conclusion, as we were asked to disregard the release upon grounds which, had they been made out, would have justified us in so doing. The applicant signed as a marksman, being unable to read or write, and the document was attested by respondents' clerk. We therefore thought it incumbent on the respondents to support the instrument by means of evidence, showing that the claimant knew what he was signing, and the full effect of his act. The respondents were under no inducement to procure a release beyond getting the matter off their books, as they bore none of the expense, and were fully indemnified by an insurance company. After the accident on the 19th April, the claimant's wife wrote to Mr. John Mill, the senior partner of respondents' firm, asking him what he intended doing for her husband, and describing his condition but not making any further claim; but all questions as to notice or claim may be assumed to have been got over by the payment from time to time made to claimant, for which he gave receipts, "on account of claim under Workers' Compensation Act," or "on account accident," or "payment of part claim insurance." Mr. Mill, sen., saw claimant after

the accident, and gave him £5, irrespective of any liability. There was a mass of evidence as to conversations with Mr. Mill, his son, and others about a promise of light work and other matters which, in the view we take of the case, ceases to be important.

It was in evidence that claimant had had five previous accidents in respondents' service for which he had been compensated, from which we were asked to infer that he was getting too old and was not nimble enough for this work. It does not appear clear to us that there was sufficient in this accident to permanently disable a man, but added to existing rheumatism it certainly affected him for some time. Medical evidence left it difficult to determine how far claimant's inability to do the very heavy work of his former occupation was due to growing stiffness, increasing with years, and how far it was attributable to the result of the accident. The onus of satisfying the Court on this point is in every case upon the claimant. One medical gentleman attributed it to the one cause and two others to the other. Dr. Coughtrey considered that there was no clear evidence proving permanent injury, while from age he had ceased to be fit for hard work. Dr. Borrie, who thought it probable that there was permanent injury, had, on the 3rd August, given a certificate that Shields "is now fit to resume light work." Dr. Coughtrey considered that a month or so after that date he should be able to resume his ordinary work. Dr. Coughtrey's opinion was supported by that of Dr. Marshall Macdonald. There was evidence that for some years while from time to time getting involved in accidents claimant had generally been placed as an extra man in gangs in the hold, not as one of the usual gang of four. While inclined to attribute the condition for a certain period to both alleged causes, we should find it very difficult were we called upon to do so to determine when that period ended. We think, however, that that is the very thing that the parties intended to determine, and did determine themselves. Whether the claimant might have done better by holding out or whether he had not really a better case than the settlement implied is not now the question. The Act (section 8) contemplates settling the matter by agreement, and if such an agreement is made this Court does not require jurisdiction to settle the dispute by arbitration.

The circumstances to which we have referred seem to show that it was not unreasonable that the parties should have regarded the disablement actually attributable to the accident as temporary or difficult to determine, and the consequent money-claim as one not running into large figures. In these circumstances, they met on the footing, as it were, of Dr. Borrie's certificate. We are satisfied both with the manner in which Mr. Howden, accountant to John Mill and Co., gave his evidence, and with the fairness of his mode of procedure. It is probable that in this case, as in most others, the claimant regarded his claim as a claim for insurance—*i.e.*, considered that it was the insurance company that had to pay him. He had a discussion with Mr. Howden in which he told that gentle-

man that Dr. Borrie had given him a certificate that he was fit for light work. Mr. Howden advised him to wait until he was thoroughly fit, and then come down and fix up the insurance. About three days before he came he told Mr. Howden he now felt all right and fit for work. He wanted to go back and start work again. Mr. Howden asked him if he was ready to "sign off the insurance now." He said he was, and they went into dates and found he had been off work twenty-nine weeks. Mr. Howden's evidence continues thus: "I asked him if he would feel quite satisfied if we paid him £1 a week for twenty-nine weeks, and he gave us a full discharge. He said he was quite willing to do that. I told him, if he was quite satisfied I would communicate with the company. I communicated with the company. Brownlie sent down a cheque and a discharge. Shields came to the office. I told him I had a cheque for £29. I had paid him £14. I had a cheque for £15, and asked him if he would sign the discharge. He was quite willing. Paid him £15. I didn't read the document over. Didn't see much good. I told him it was a discharge, releasing John Mill and Co. from the effect of any accident, and if he signed that voucher he would have no further claim against John Mill and Co. I was and am satisfied that he understood the matter. Firm have no pecuniary interest. They are fully indemnified by company. From that time forward Shields never applied for further payment. Saw him daily on the wharf. He never hinted at compensation until after Mr. Mill returned. After that payment I was in the habit of speaking to him almost daily. Witness goes on to say that he left the matter alone for a couple of months after the certificate. He says that on the five previous occasions he took a similar release. We do not think that this explicit statement could be answered save by showing either that fraud had been committed or that claimant totally failed to understand the effect of the transaction. Fraud on Howden's part or on the part of the respondents would be motiveless, and was not really suggested. What was suggested was that it was incredible that the man should knowingly have settled for £29 a claim in respect of permanent disablement. We think that this aspect of the case is not sustained, that the claim though a real one was of very doubtful value, that the claimant fully appreciated this and settled it as he had settled five prior claims on what he considered to be a fair basis, and that it is proved that he was fully aware of the nature and effect of this settlement.

The claim is dismissed with £7 7s. costs, witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 13th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(21.) TRAVIS v. WALTER SINCLAIR WATERSTON.

In the Court of Arbitration, Otago and Southland District (Invercargill).—Between Charles Alexander McKay Travis, claimant, and Walter Sinclair Waterston, respondent.

Mr. J. Macalister for claimant; Mr. Watson for respondent.

JUDGMENT OF THE COURT.

THE claim set forth that on the 17th February, 1904, the claimant was hurt "hauling up a boat by means of a rope. Injury to face, chest, and side caused by rope breaking."

The respondent set up an affirmative defence only—namely, that payment of £1 per week to the 4th June, 1904, had sufficiently compensated claimant for his injuries.

The claimant, a young man, employed as a coal-carter at £2 per week, and described by his employer as capable of labourer's work involving heavy lifting, &c., had received a severe crushing blow on one side in the manner described. There is no doubt that his side was hurt and his lung injured to some extent. According to his own account his spine was hurt. The question to be determined was a question of fact—namely, whether he had recovered. There was conflicting medical evidence, but the conflict was more apparent than real, as the medical witnesses on one side depended on statements of the claimant as to what he felt, while a medical gentleman called on the other side relied solely on what he could discover from his own examination. We are quite satisfied that the claimant was severely bruised, and that the effect of this was not merely evanescent. We find ourselves, however, in a difficulty in attempting to determine the probable duration of the claimant's inability to do hard work, as he was not perfectly candid in endeavouring to assist us. He had taken what must be deemed to be hard work on three several occasions since the accident, and on hearing of one of these occasions his employer stopped the payment of £1 per week which he had at first allowed him. Claimant did not, until pressed in cross-examination, fully disclose the extent of his work, and with respect to one job he gave a reason to the Court for throwing it up which was different from that given to an independent witness. He had twice worked for this witness, on one occasion for six days; but we give credit to the evidence of his medical adviser to the effect that this work, which was done some months since, and on hearing of part of which the payments were stopped, was undertaken too soon. We also accept the statement of this medical witness to the effect that the mischief in the neighbourhood of the lung has not wholly disappeared, but will probably disappear in a month or two. As to the alleged soreness on the spine, tests taken at intervals of the relative strength of the claimant's right and left hands show that normal equilibrium is being rapidly restored, and we decide that in the absence of more distinct evidence as to the gravity of the symptoms respecting the soreness, we must for the present hold that the claimant is well on the way of being relieved of this disability.

The award will be a declaration of liability with compensation at the rate of £1 per week until the end of the week ending on or next after the 31st October, 1904. The compensation will then end, unless a further order of the Court be hereafter made under the declaration of liability. The respondent will pay to the claimant £7 7s. costs, with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 8th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(22.) DECISION OF THE COURT *RE* INVESTING COMPENSATION MONEY.

In the Court of Arbitration, Otago and Southland Industrial District (Dunedin).—Between Bessie Warren, of Dunedin, widow, applicant, and Gilbert Ure Warren (an infant), respondent.

Mr. Barclay for applicant; Mr. Stilling for infant respondent.

JUDGMENT OF THE COURT.

THE applicant, the widow and administratrix of the deceased, had agreed to accept £390 in settlement of the claim. She is a young woman with one child, a son of nine years of age. The husband had died intestate, leaving an estate of which his infant son's share was equal to about £200. The applicant, seeing that there was in a sense a conflict of interest between herself and her son, had appointed Mr. Stilling as counsel to act in his interest. Counsel for both parties concurred in advising that the Court should be asked to direct that the amount of the son's share of his father's estate be paid into the hands of the Public Trustee to await his attaining twenty-one years, and that his actual fortune should be thus secured against all risk, and that the whole compensation should be paid to the widow, who was under the obligation of supporting her son.

We desire to say, in the first place, that we think it open to objection in principle that the widow should have appointed counsel to represent her son, though she acted in the manner she thought best in her son's interest, and in the absence of a settled practice, quite reasonably, while the appointment is one of which we entirely approve. The appointment should not, however, come from a person adversely interested, as the duty of counsel is analogous to that of guardian (Dunedin Finance Company *v.* Baird—11 N.Z.L.R., 192). This Court will in a case where it seems necessary appoint a guardian *ad litem*, and has at times done so. In ordinary cases, however, it will, on the suggestion of a party in the applicant's position, content itself with appointing counsel to advise in the interests of a person under disability by analogy to Rule 71 of the Code of Civil Procedure. The selection of counsel in such a case will be made by the Court, either at the instance of some relative unconnected with the applicant or by some mode of selection adopted by itself, but always with a sense of responsibility towards the person interested. In a case at Blenheim, where the parties were infants and were poor, the solicitor for the respondent,

who was no longer interested in the case, assisted the Court. An application to appoint counsel may be made by letter addressed to the Clerk of Awards when the Court is not sitting in the industrial district, and will be dealt with wherever the Court may be.

With respect to the fund itself, we think that we ought to consider ourselves to be in a sense the guardians of the infant, and that we ought to prescribe conditions from this point of view such as will protect the interests of the infant without hampering the mother or interfering with the ordinary jurisdiction of the Supreme Court. The order which we think the proper one to be made is as follows: That upon payment by the applicant as administratrix of the late husband's estate to the Public Trustee of the amount found to belong to the infant, Gilbert Ure Warren, as part of his late father's intestate estate, the following consequences ensue: (1.) That there be paid to the Public Trustee the further sum of £100 out of the moneys paid or to be paid by way of compensation for the death of the deceased, and, subject to the payment of the costs herein mentioned, that the applicant receive and retain the balance of the said sum of £390 herself. (2.) That whenever she shall find it necessary to obtain any further sum or sums to be applied to or towards the maintenance and education of her said son, she be at liberty to apply to the Public Trustee therefor. (3.) That upon such application the Public Trustee shall be entitled to make her such payment or payments as he shall in his discretion think fit until the said sum and all accrued interest be exhausted. (4.) That until such sum be exhausted the Public Trustee have liberty to pay to her for the maintenance and education of her son the interest accruing in his hands, as well in respect of the said sum as in respect of the sum paid to the Public Trustee as part of the distributive share of the said Gilbert Ure Warren of his deceased father's estate, and in the event of her dying before the said sum is exhausted, the Public Trustee shall administer the same for the benefit of the said Gilbert Ure Warren in such manner as he shall think best. (5.) That when the said sum is exhausted the Supreme Court has exclusive jurisdiction to make orders respecting the disposition of the sum representing the distributive share of the said Gilbert Ure Warren of his deceased father's estate, and the interest thereafter accruing thereon. (6.) That nothing in this order contained shall be deemed to affect the legal liability of the respondent to support her said son. (7.) That the parties and the Public Trustee have liberty to apply to this Court as they may be advised. (8.) That there be allowed to the applicant's solicitor the sum of £7 7s. and disbursements, and to Mr. Stilling the sum of £3 3s. out of the sum by way of compensation.

Dated this 13th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

The following cases have been settled out of Court: *Campbell v. Joseph Hatch*; *Penman v. The New Zealand Coal and Oil Company*.

FILED IN NOVEMBER.

WELLINGTON INDUSTRIAL DISTRICT.

(23.) ROBERTS *v.* CAMPBELL AND BURKE.

In the Arbitration Court, Wellington District (Wellington).—Walter Roberts, of Wellington, apprentice, claimant, *v.* Alexander Campbell, and Daniel Burke, of Wellington, carpenters, respondents.

Izard for claimant; Treadwell for respondents.

JUDGMENT OF THE COURT.

CLAIMANT was an apprentice at 13s. per week under articles which gave him periodic increases of wages: shortly before his wages had been 8s. He was a lad of fourteen or thereabouts. It was admitted that even when he had completely learnt his trade, the injury which he had suffered, involving the loss of fingers, would prevent him from earning full wages. The employers had continued to pay his full wages, and there was no reason to doubt that they would fulfil their obligations under the indenture.

Izard, for complainant, only asked for a declaration of liability, leaving any further question to be determined when the indentures had expired.

Treadwell asked for a ruling as to an infant claiming without the intervention of a guardian *ad litem*, and as to the power to appoint one. There is no rule here analogous to the English Rule 7.

Izard stated that the lad's father was willing to act if the Court held that it could appoint him.

THE PRESIDENT: The Act creates the right to compensation, and the mode in which the infant claimant is to recover is a question of procedure over which the Court has control ("Industrial Conciliation and Arbitration Act, 1900": sections 76, 90, 102, (1), (a)). This cannot be affected by the want of a rule. In a Magistrate's Court the case is different, for there the superior Courts are open; here this Court alone can give the relief. The Court will make an order appointing the father guardian *ad litem*, as in a case in the Supreme Court.

Treadwell asked the Court's direction as to how the declaration of liability should be drawn up. He suggested that the apprentice, when he had fulfilled his indentures, would at most become entitled to half his present wages. His earning-power would certainly be greater than that. The practice had been adopted in England of making a declaration of liability and awarding 1d. per week, to be varied on application. This has been held unnecessary (*Chandler v.*

Smith: 1899, 2 Q.B., 506, 516), though the nominal sum is still sometimes awarded. He objected to costs being ordered.

THE PRESIDENT: We have made a practice of making a declaration of liability without awarding a nominal sum. We make such an order in this case. This will leave it open to claimant to apply to the Court to fix the amount of compensation when so advised. As to costs: The institution of these proceedings was necessary for the protection of respondents as well as in the interests of claimant, as an agreement under section 8 could not be made with the infant. We allow £3 3s. costs.

Dated the 30th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(24.) COLLIER *v.* HOPKINS.

In the Court of Arbitration, Wellington District (Wellington).—
Collier, claimant, *v.* Hopkins, respondent.

Dunn for claimant; Treadwell for respondent.

JUDGMENT OF THE COURT.

THE application was filed on the 23rd December, 1903. There were some negotiations, and on the 24th February, 1904, liability was acknowledged, as was also the amount payable. This was not arrived at without some dispute. A reply was filed in September, 1904, shortly before the sitting of the Court. This was after claimant's solicitor had written claiming costs of the application.

THE PRESIDENT: We think that in the particular circumstances of this case the filing of the application is shown to have been a necessary step which brought matters to a head, and that a right to some costs is shown. That being so, the claimant has a right to come here and apply for them. We allow £2 2s. costs.

Dated the 30th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(25.) McCROSSAN *v.* BARTON (REVIEWING WEEKLY PAYMENTS).

In the Court of Arbitration, Wellington District (Wellington).—
William McCrossan, applicant, *v.* John Barton, respondent.

Mr. D. M. Findlay for applicant; Mr. Myers for respondent.

JUDGMENT OF THE COURT.

MOTION to review weekly payments under "The Workers' Compensation for Accidents Act, 1900."

In September, 1903, claimant had judgment in this Court awarding him a declaration of liability and half-wages at the rate of £1 4s. per week (2 Dec. on W.C.A. xvii). The only question then in dispute was whether respondent was really the employer of claimant. It is not disputed that claimant was then wholly disabled. A motion is now made to review the weekly payments, and bring them to an end on the ground that claimant has recovered.

Several medical gentlemen were examined, between whom there was no substantial difference of opinion. Doctors Purdy and Hector considered that claimant had virtually recovered, and would have wholly recovered had he been less timid about incurring the initial pain which might be caused by vigorously using his foot. He has since done labourer's work, but it is not clear to what extent. These gentlemen found improving measurements of the foot, which supported their views. Dr. Ewart took substantially the same view of the case. Several of these gentlemen noticed that there was a large hard scar on the sole of the foot of a kind that sometimes made walking painful. They thought that the foot would always be clumsier and that there might be a liability to feel pain at the end of a heavy day's work, but that this ought to disappear by next morning, and that these drawbacks ought not to affect the claimant's wage-earning power. McCrossan complained that when he attempted to work he felt pain in the foot. Dr. Elliot said that the claimant complained to him that when he did excavating-work, he felt pain in the scar on the sole of the foot, and that this prevented him from doing such work. He made no other complaint of pain in working than that traceable to the scar. Dr. Elliot advised surgical removal of the scar, and other medical witnesses agreed that it would effect an improvement. It would disable claimant for a month.

We do not think that claimant has made all possible effort by using his foot to assist the final cure, and we think that with a little more display of energy on his part he will find himself able to earn full wages. We think, moreover, that his remaining disability is due to the scar, which is superficial and might have been removed before now. It is, however, a consequence of the accident.

We award that his present payments continue for five weeks from the 1st day of October, and that all payments then cease, but that the declaration of liability remain in force.

As to the costs: This proceeding was for the benefit of the respondent, and though successful in bringing matters to a head it has not been wholly successful. We think that each party must bear his own costs.

Dated this 3rd day of October, 1904.

FREDK. R. CHAPMAN, J., President.

(26.) HENRY RICKARD *v.* ALBERT RICKARD, BENJAMIN MOXHAM, AND ERNEST H. SNOW.

In the Court of Arbitration, Wellington District (Wellington).—
Henry Rickard, claimant, *v.* Albert Rickard, Benjamin Moxham, and Ernest H. Snow, respondents.

Mr. Herdman for claimant; Mr. Menteth for respondents.

JUDGMENT OF THE COURT.

THE claimant was injured by accident when felling bush on respondent Snow's land in November, 1902.

Several defences were raised, but only one has to be considered. The case was partly heard in September, 1903, and for some unexplained reason stood over until 6th October, 1904. Moxham and Albert Rickard entered into a contract with Snow to cut down the bush upon a section of land containing 67 acres at £1 5s. per acre. The contract was precise in its terms, and was signed by the three parties. In the view the Court took of the evidence, these two men invited claimant, who was the brother of Albert Rickard, to join them in carrying out the contract. He did so, and it was understood that all three were to earn the contract price, and to share it according to the number of days each worked. The expression "wages" was said to have been used with reference to claimant's remuneration, but particular expressions like this were deposed to long after the event. Albert Rickard was injured early in the history of the contract by an accident outside the work. Then Henry Rickard was injured, and was obliged to stay in the hospital until after the felling was completed. Snow never had anything to do with Henry Rickard. On the completion of the work, Albert Rickard and Moxham made up an account showing how much each had earned, and presented this to Snow, who at their request sent each a cheque for his amount. During the progress of the job wagesmen were hired to replace the injured men, and these were paid £1 10s. per week each. The Court did not think it necessary to call for evidence for the defence, but called on Mr. Herdman to support his case.

THE PRESIDENT: We are satisfied that upon the evidence for the claimant he does not make out a case against the respondents. The case has been very fairly put before us by counsel and by the brothers Rickard as witnesses. We attach no great importance to

particular expressions which had no importance when used, and which witnesses attempt to repeat after a long lapse of time. We take the substance of the matter as it stands out upon the whole evidence. This appears to us to make this position clear: Albert Rickard and Moxham obtained this contract from Snow, and thereafter entered into partnership or joint venture with claimant. It really became a family transaction. The three were partners or coadventurers for the purpose of carrying out the contract with Snow. There was no legal difficulty in forming such a partnership; Snow's consent was not necessary. There is no substantial evidence that Henry Rickard agreed to become the servant of the other men. The clearly ascertained facts are against this. They show that in point of law the two who obtained the contract agreed to hold it for the three, who thus become interested in the profits. This is necessarily inconsistent with the relation of master and servant. The case must be dismissed. Costs will be allowed—£7 7s. and disbursements.

Dated the 6th day of October, 1904.

FREDK. R. CHAPMAN, J., President.

CANTERBURY INDUSTRIAL DISTRICT.

(27.) GATES *v.* WEBB.

In the Court of Arbitration, Canterbury District (Christchurch).—
Between Alfred Charles Harold Gates, claimant, and Arthur Henry Webb, respondent.

Mr. Stringer for claimant; Mr. Harper for respondent.

JUDGMENT OF THE COURT.

THIS case was so far disposed of at the hearing that we intimated the result at which we had arrived, and deferred giving reasons until we could state them in writing.

The claimant, who was a carter in respondent's employ at £2 2s. per week, stated that while lifting heavy timber a piece turned and caused a wrench to his back. The seat of injury was in the lumbar region. These facts were not disputed, but it was alleged that the incapacity had ceased before the application was filed.

The accident happened on the 5th January, 1904, and the claim was filed on the 25th July. Respondent continued to pay compensation at the rate of £1 1s. per week for thirteen weeks. In April respondent had obtained a report from a medical man to the effect that the actual effects of the injury to the back had passed off, and in consequence of this he discontinued the payments shortly afterwards.

A large amount of medical evidence was called on both sides, which in the main agreed, though the witnesses disagreed as to certain inferences. The general effect of this evidence was the

applicant was still unable to work; that the actual effects of the injury had probably passed off, but that neurasthenia had supervened. Medical witnesses put the connection between this condition and the accident in various ways, but generally admitted that it was in a sense a result of the accident. Those who took the view most unfavourable to the claimant said that it was really due to his having a money claim pending, and that he would get well a month or six weeks after this was settled. Dr. Jennings, one of the claimant's witnesses, said, "The present condition is largely caused by mental worry, all relating back to the original accident. I don't think he can work in his present condition as long as he has this worry." A case of fraud is not, in our opinion, made out.

It is certainly hard upon the respondent that he should be held liable for results beyond the immediate effects of the accident, which may have a duration dependent on the date of hearing of this claim. It may, however, be pointed out that it was open to respondent to take the initiative if he thought fit to do so. Had he done so soon after receiving the medical report in April, the case might have been heard in June instead of September. The case belongs to a difficult class, but we must hold that the claimant's condition was a consequence of the accident, despite the fact that it was a consequence which would probably only be generated in a more or less morbid subject. (*Golder v. Caledonian Railways*: 5 F.: 123 Ct. of Sess.) It was not, however, induced by claimant.

We accordingly find that claimant is entitled to a declaration of liability, that the payments at the rate of £1 ls. per week be continued until the 29th October, or the end of the week ending next after date. The payments will then wholly cease, subject to the declaration of liability. The claimant will have his costs, £7 7s., with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated the 1st day of October, 1904.

FREDK. R. CHAPMAN, J., President.

(28.) DARRAGH *v.* JOHN DAVIDSON.

In the Canterbury Industrial District.—In the matter of "The Workers' Compensation for Accidents Act, 1900"; and in the matter of an arbitration between Patrick Darragh, of Washdyke, labourer, claimant, and John Davidson, of Timaru, general carrier, respondent.

WHEREAS the claimant, the said Patrick Darragh, has agreed with the respondent to accept the sum of £188 (of which the sum of £30 has already been paid) in full satisfaction of all claims which he may have against the respondent in connection with the above claim:

Now, we, having duly considered the matters submitted to us, do hereby make our award as follows:—

We order that £158, the balance of the said sum of £188, be paid and applied by the respondent as follows:—

(a.) The sum of £97 10s. to William Darragh in trust for the claimant for expenses incurred by the claimant for medical attendance, hospital expenses, and in connection with the fitting of an artificial foot, and the purchase and fitting-up of a bakery business at Temuka recently purchased on behalf of the claimant.

(b.) The sum of £10 10s. to Messrs. Tripp and Rolleston, of Timaru, solicitors for the claimant, as costs of and incidental to this arbitration.

(c.) The balance, being the sum of £50, to the Public Trustee, to be invested by him on behalf of the said Patrick Darragh, and to be paid to the said Patrick Darragh when he attains the age of twenty-one years—viz., on the 4th day of August, 1907, the income from such investments in the meantime to be paid to the said Patrick Darragh half-yearly.

Dated this 15th day of September, 1904.

FREDK. R. CHAPMAN, J., President.

(29.) McDONALD FAMILY v. THE SHAW, SAVILL, AND ALBION COMPANY (LIMITED) (APPORTIONING AMOUNT AGREED UPON AS COMPENSATION).

In the Court of Arbitration, Canterbury Industrial District.—In the matter of “The Workers’ Compensation for Accidents Act, 1900”; and in the matter of an arbitration between Isabella McDonald, of Sumner Road, Lyttelton, widow, for herself and her children, Eva Minnie McDonald, Maggie McDonald, George Thomas McDonald, and Lily Ellen McDonald, claimants, and the Shaw, Savill, and Albion Company (Limited), respondents.

FRIDAY, THE 16TH DAY OF SEPTEMBER, 1904.

UPON reading the application for arbitration dated and filed herein the 3rd day of September, 1904, and upon hearing Mr. Russell of counsel for claimants and Mr. Stringer of counsel for respondents, it is ordered that the sum of £400, the amount of compensation agreed upon and paid by the respondents into this honourable Court, be apportioned and paid out as follows, that is to say: that the sum of £200 be paid forthwith to the claimant, Isabella McDonald, absolutely, and that the balance of the said sum of £400, that is to say the sum of £200, be paid to the Public Trustee of New Zealand upon trust, to deal with the same in such manner and upon such terms as the said Public Trustee shall think fit, and to pay the said Isabella McDonald, for the maintenance of her children, the said Eva Minnie McDonald, Maggie McDonald, George Thomas McDonald, and Lily Ellen McDonald, the sum of £3 per month until the said principal sum and interest thereon from time to time accruing be exhausted, and this Court doth further order that the parties hereto and the Public Trustee have liberty to apply from time to time for directions as they may be advised, and it is further

ordered that the costs of and incidental to this order be fixed at ten guineas, and disbursements, and be paid out of the £200 to be paid to the said Isabella McDonald absolutely, as aforesaid.

By the Court,

H. M. LEE,

Clerk of Awards.

OTAGO AND SOUTHLAND INDUSTRIAL DISTRICT.

(30.) LUCK v. THE GOLDEN CHAIN DREDGING COMPANY (LIMITED).

In the Court of Arbitration, Otago and Southland District (Dunedin).—Between John Luck, claimant, and The Golden Chain Dredging Company (Limited), respondents.

Mr. W. L. Moore for claimant; Mr. Sim for respondents.

JUDGMENT OF THE COURT.

THE claimant, a blacksmith employed on respondents' gold-mining dredge working at Luggate, in Central Otago, claimed compensation for the total loss of the sight of his right eye. There were other items of claim, in the nature of consequential injuries, which were not proved. He was employed at £4 per week, and worked for two weeks after the accident at that rate. He was injured on the 30th March, 1903, the day on which he commenced to work for respondents. He was engaged repairing the forge on the dredge when several small pieces of steel flew off the chisel he was using and entered his right eye, which in the end was destroyed.

The defences raised were (a) want of notice and (b) that the claim was not made within three months after the accident.

Formal notice of the accident was not given until the 13th July, 1903, but other circumstances were relied on as rendering this unnecessary. On the 20th April, Kitto, the dredgemaster, wrote officially to Mr. MacLean, the secretary of the company, detailing the accident and the treatment of claimant by a local medical man. On the 2nd May he signed and forwarded to the company a form filled up with particulars of the accident addressed to the Commercial Union Assurance Company (Limited), headed "Employers' Accident Compensation Claim." This form had been sent up to him from Dunedin by the Secretary. This claim states that one of the dredge hands was present when the accident happened, and it is manifest that the dredgemaster heard of it in the ordinary course on the same day. We do not think that it is essential that the notice should be given by the claimant himself. The object of the notice of accident, which has to be given "as soon as practicable after the happening thereof, and before the worker has voluntarily left the employment in which he was injured," is to give the employer a fair opportunity of inquiring into the matter. It is a reasonable

cause for dispensing with the notice under the powers conferred upon the Court that the accident hapened virtually in the presence of a responsible official of the company, who reported it to the company in due course, and that the company has not been prejudiced by any delay. The circumstances here would amply justify the Court in taking this course, even if it were obliged to say that the notice sent by the dredgemaster was not sent "as soon as practicable." The real defence, however, was that no claim had been made within three months after the occurrence of the accident. We can find no evidence of a claim having been made, and we have therefore to investigate the history of the case with the object of determining whether the respondent has or has not disintitled himself to raise this defence.

The onus is upon the claimant to make out that the reason of his failure to make a claim entitles him to succeed despite that failure. We think that in *Teal v. Stevens* (2, Decisions under Workers' Compensation Act, xxxv) we correctly laid down the rule to be observed in determining this question. "Equitable circumstances, to be available as a bar to the setting-up of this defence, must be such as have, prior to the expiry of the time for making the claim, lulled the claimant into a sense of security, and so induced him not to claim compensation." It is important to add that these circumstances must arise out of the acts of the respondent to be available against him.

It is suggested that the respondents are within this rule estopped from setting up this defence, and in support of this suggestion the following facts are relied upon: The letter from the dredgemaster to the secretary, dated the 20th April, contained the following passage: "We went down on Saturday, 18th April, to see the doctor again. He told Luck he would have to go to Dunedin to see Dr. Ferguson, so I told Luck to call on you and you can report it to the insurance company, as he can't afford to pay all the expenses himself." Claimant went to Dunedin and on the 21st April saw Mr. MacLean, the company's secretary. Apparently in claimant's presence, Mr. MacLean telephoned the insurance company informing them of the occurrence. Luck says that he told Mr. MacLean that Dr. Ferguson had advised him to ask Mr. MacLean to claim half his wages, but he did not say from whom. He went into the hospital and remained there until about the 20th June, when he called on Mr. MacLean again and asked him if there was any money from the insurance. Mr. MacLean replied, "Yes, here is a cheque." It was a crossed cheque for £20, and Luck and his wife having no banking account went to the company to get it cashed. The company took the cheque and sent the money down to the claimant's lodgings. Some time before this a Mr. Houston, a law clerk, as a friendly act to assist Mrs. Luck, but without communicating with Luck, called on Mr. MacLean, and spoke about getting an advance. He says that he spoke to Mr. MacLean about the notice. "I asked him if he had received proper notice, as if he had not received proper notice

I would advise the Lucks to immediately employ a solicitor. He told me in reply that he had got notice, that he had already informed the insurance company, and not to employ a solicitor for them as he would get as much out of the insurance company for the Lucks as a solicitor could." He says he saw Mr. MacLean several times. "This represents the result of several conversations. The cheque for £20 also represented the result of conversations. I understood that it represented ten weeks' half-pay. He adds, "He said as much as that it was not the affair of his company so much as of the insurance company. That it didn't affect them." MacLean on the 17th June wrote Mrs. Luck, "I am sorry I missed you this morning when I was down at the insurance company about your husband. The manager of the Commercial Union Company informs me that he has not as yet heard from his head office, but expects to do so very shortly. As soon as I get a cheque from the insurance company you shall have it. Please let me know as soon as possible how your husband is keeping. Kitto and others wish to know." MacLean said that he always took up the stand that it had nothing to do with his company: that it was really a matter between Luck and the insurance company. He says that the matter never came before the directors of the dredging company, and that he never had authority to waive anything. He disputes the statement that he said he could get as much from the insurance company as any solicitor, but the statement is immaterial, and something of the sort may well have been said and forgotten. None of the conversations deposed to by Houston seem to have left much impression on MacLean. We are satisfied with the *bona fides* of both these witnesses, but the result of the whole of the proceedings is to show that MacLean did not consider that he was acting in defence of the company nor in any way in its interest, but that he was doing his best for Luck. We cannot therefore treat his conversations with Luck and Houston as acts done in furtherance of his duty as secretary to the company, and doubt whether they would advance matters were they so treated.

The question of the effect of the payment by or through the insurance company remains to be considered. A payment by an employer has to be considered together with the accompanying circumstances in order that it may be determined whether they together amount to evidence of an admission of liability, and an agreement to pay compensation within section 8 of the Act. In *Rendall v. Hill's Dry Docks and Engineering Company (Limited)* (1900: 2 Q.B. 245), weekly payments through an insurance company were made for nearly a year, and a receipt given "on account of compensation which may be or become due to me under the Workers' Compensation Act," &c. The Court of Appeal held that this did not affect the right of the company to set up the defence of want of claim. A. L. Smith, L.J., in giving the judgment of the Court, says, "Suppose that the appellants had not been insured against accidents to their men, and that it had been proved that they had paid the respondent £1 a week: would that fact be any evidence

of a waiver on their part of the claim for compensation being made within six months? Undoubtedly the mere fact that such payments had been made would not be evidence of waiver. Here the appellants were insured, and what happened was this: although they received no notice of accident or of intention to claim compensation, they sent to the insurance office particulars of the accident, in which they said that the man's wages were £2 per week. What did the insurance company do on receiving these particulars? They did not leave the respondent without any money to go on with; they sent him £1 per week on account of any compensation that might be or become due to him: in so doing they stood in the shoes of the employers for whom they paid the money." He goes on to put the test. "Where is there any evidence in the present case that the parties agreed that there was a liability on the part of the employers to pay compensation?" The facts of that case were very like those in this case. It distinguishes the case of *Wright v. John Bagnall and Sons (Limited)* (1900: 2 Q.B. 240), where the circumstances showed in the opinion of the Court that there was such an agreement, a conclusion of fact similar to that at which the Court arrived in the recent case of *Shields v. John Mill and Co.*, where the conclusion, however, was not material to the decision of the case.

The question of the effect of payment, coupled with other circumstances, was fully dealt with by this Court (*Cooper, J.*, President) in *Stevens v. The Kauri Timber Company* (5 Gaz. L.R. 255: 2 Decisions under C. Act, page vii, 5th February, 1903), where the acknowledgment of liability was held proved, and the whole of the authorities were reviewed, including the earlier case in this Court of *Barrie v. The New Zealand Shipping Company* (5 Gaz. L.R. 21: 1 Decision under Workers' Compensation Act 34). It had also been dealt with in the earlier case of *Hamilton v. New Zealand Crown Mines Company* (5 Gaz. L.R. 182: 2 Dec. under C. Act 11), where the payments were accompanied by circumstances showing clearly that the right to compensation had been agreed to; and in *Teal v. Stevens*, where the sums alleged to be paid were given as a present. When *Wright v. Bagnall and Rendall v. Hill's Dry Docks Company* were decided, it had recently been decided by the Court of Appeal (*Powell v. Main Colliery Company*: 1900, 2 Q.B. 145) that the claim was the proceeding filed in the Court, but the decision of the House of Lords reversing that decision and holding (*Powell v. Main Colliery Company*: 1900, A.C. 366) that it is something apart from this, does not affect the authority of these cases, as the period of limitation in either view runs from the date of the accident to the making of the claim, which is a statutory step, however informal it may be.

Upon these grounds we come to the conclusion that this case must be dismissed. Without expressing any opinion upon the actual merits of the case, which were further in controversy, as the claimant had subsequently obtained employment at a fair rate of remuneration, while his prospects with this company were limited by

the fact that it went into liquidation in July, we must express our regret at finding that a considerable number of cases fail on this ground. Claimants do not appear to be properly informed as to their rights, and appear to allow matters to run on, letting time slip past, under the impression that these depend on the circumstances that the employer is insured. In this case, not only the claimant but also Mr. MacLean were evidently under this impression. Some simple method ought to be adopted of informing workmen in factories, and other fixed places where work is done, of the desirability of having notice of accident and a proper claim sent in promptly.

Application dismissed, with costs £7 7s., witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 1st day of October, 1904.

FREDK. R. CHAPMAN, J., President.

(31.) DUFF *v.* GRIMWOOD AND WILLIAMS.

In the Court of Arbitration, Otago and Southland District (Invercargill).—David Duff, claimant, *v.* Robert Grimwood, Frank Henry Williams, and William Forbes Williams, respondents.

Mr. Moffatt for the claimant; Mr. R. W. Hall for Grimwood; Mr. Rattray for Frank Henry Williams; Mr. H. Macdonald for William Forbes Williams.

JUDGMENT OF THE COURT (6th and 7th September, 1904).

THE case was disposed of at the hearing. The claimant had been badly hurt through having fallen while carrying flax up a slippery plank into the scutching-mill. He was on the way towards recovery, but was still quite unable to work. Medical evidence supported his own statement. Various defences were raised, the chief of which were disclaimer by F. H. Williams and W. Forbes Williams and denial of liability by Grimwood.

Claimant was a labourer employed at the mill by the hour, and, as found by the Court after investigation of pay-sheets and other evidence, his average weekly earnings between December and May were £1 6s. per week. Grimwood and F. W. Williams were in partnership as flax-millers under the style of "Grimwood and Williams." W. Forbes Williams was a sleeping partner. F. H. Williams lived near the mill, and managed it. On the 2nd May a memorandum of dissolution was signed by Grimwood and F. H. Williams, and this was duly advertised on the 4th May. On the 2nd May Grimwood's solicitor wrote asking F. H. Williams to take charge of the mill for Grimwood. On 5th May claimant came to work as usual, and in the course of the day met with the accident.

At the conclusion of the claimant's evidence as to the principal facts, Mr. Moffatt admitted that he could not succeed against F. H. Williams, as the dissolution had been duly advertised. He stated, however, that as W. Forbes Williams was not mentioned in the notice of dissolution, he proposed to call evidence to show that after the date of the accident this respondent had, in an arbitration proceeding in connection with the dissolution, claimed that the dissolution was ineffectual so far as he was concerned, as he had not concurred in it. He admitted that the claimant never heard of his (respondent's) connection with the firm until long after the accident.

Mr. Hall admitted that he could not further defend the case on the merits, so far as Grimwood was concerned.

The hearing stood over until the next day, Wednesday, the 7th September. On resuming—CHAPMAN, J. (President), stated that he had considered the evidence proposed to be adduced against W. Forbes Williams, and that, giving the greatest possible effect to it, such evidence could not make a case against this respondent. He was a sleeping partner, and was never held out as a partner; and when a sleeping partner retired there was no occasion to proclaim his retirement in order to relieve him of future liability. Thus, Grimwood and F. H. Williams were capable of dissolving the partnership between them, and this put an end to the partnership *in toto*. Up to this point the daily hiring of labour by F. H. Williams was in virtue of his plenary agency as a partner, but on the 2nd May that ceased, and thereafter he acted under a totally different authority—viz., the written authorisation of Grimwood requesting him to take charge, which in no way bound W. Forbes Williams. From no point of view, therefore, could the latter respondent be bound: he did not, in fact, hire the claimant on the day in question. These two respondents must be discharged from the proceedings, with £7 7s. costs to each, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards. As against Grimwood the following award was made: A declaration of liability is made. This respondent is ordered to pay to the claimant the weekly sum of 13s. until such payment is redeemed, ended, or diminished in accordance with the provisions of this Act. The payments will commence as from the 5th May, 1904, credit being given for any sum already paid. This respondent will pay the claimant £15 15s. for his costs, together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

(32.) KEITH *v.* SPAIN.

In the Court of Arbitration, Otago and Southland District (Dunedin).—Robert Keith, claimant, *v.* Thomas Spain, respondent.

Mr. A. R. Barclay for the claimant.

JUDGMENT OF THE COURT (12th September, 1904).

THIS case was disposed of at the hearing. Claimant had broken his arm in respondent's service. No defence was filed. Claimant stated that his arm was nearly well and improving rapidly, but not strong yet. Dr. Buck. House Surgeon at the Dunedin Hospital, said that the arm should have been well in eight or ten weeks from the date of the accident, but it was retarded. He considered that it would have completely recovered at an early date.

The Court (Chapman, J., President) considered that the evidence showed a prospect of an early recovery, and that a declaration of liability was unnecessary. Respondent's wages were £1 2s. 6d. per week "and found." The award was for twelve weeks at 19s. 3d., being half the weekly wage in respondent's service, together with half the value of respondent's board at the rate ruling in the district.

CASES SETTLED.

(33.) WELLINGTON INDUSTRIAL DISTRICT.

THE following cases have been settled out of Court: Keeble *v.* Mill and Co.; Holford *v.* McEwan; Warrington *v.* Bartholomew.

Collier *v.* Hopkins: Case settled, application for costs only; £2 2s. costs allowed by Court.

Roberts *v.* Campbell and another: Declaration by Court of liability, with £3 3s. costs.

(34.) OTAGO AND SOUTHLAND INDUSTRIAL DISTRICT.

THE following case has been settled out of Court: Kerr *v.* The Nightcaps Coal Company.

FILED IN DECEMBER.

OTAGO AND SOUTHLAND INDUSTRIAL DISTRICT.

(35.) NAPIER *v.* THE KING.

In the Court of Arbitration, Otago and Southland District (Dunedin).—John Napier, claimant, *v.* His Majesty the King, respondent.

Mr. D. Stewart for claimant; Mr. J. F. M. Fraser, Crown Solicitor, for respondent.

JUDGMENT OF THE COURT.

THE claimant is the father and administrator of John Napier, a railway bridgeman in the service of the Railway Department, who was drowned on the 15th August, 1903, by an accident arising out of and in the course of his employment. The father claimed as a partial dependant. No other question arose than the principle on which compensation should be assessed and the amount of such compensation. It was admitted that some allowance should be made for funeral expenses as decided in *Bevan v. Crawshaw* (1902, 1 K.B. 25; 85 L.T. 496; 71 L.J. (1902) 50; 4 W.C.C. 110). The claim put forward on this head was excessive. We have considered it, and allowed the subject to a reasonable degree to enter into the computation of compensation. The nature of the dependence may be thus briefly stated: The claimant was a farmer in a very small way, owning a freehold farm subject to a mortgage, which he showed yielded with its stock, after paying expenses and interest on a mortgage, a profit of about £30 a year, with dwellinghouse worth probably about 7s. per week. He was somewhat advanced in years, and his wife was living. They had several children. The sons, with one exception, were in employment in places beyond Otago, and contributed nothing towards claimant's support, and it was not shown that they were able to contribute. The remaining son, aged seventeen, lived at home, and assisted in managing the place. There was a grown-up daughter, who was too delicate to go to service, and two other daughters, aged fourteen and eleven respectively. We conclude that the general result of the evidence showed that the claimant was with respect to income somewhat in the position of a labourer earning 12s. per week with a house to live in. This sum will not

support a labourer, but we think that a labourer in the Waikouaiti district with regular employment, say, on road-mending, would be paid about £1 19s. per week, or, if provided with a similar house to that of claimant, about £1 12s. On this footing claimant required about £1 per week, not to keep him in as comfortable a position as that in which he found himself, but to keep him in about the same position of a labourer in steady employment. He was, however, in a better position, and was, in fact, something more than a labourer. The deceased earned on the average in the service of the Department £2 3s. 6d. per week, and, being allowed to live in a travelling-hut on the railway-line, he had no rent to pay. As his parents supplied him with provisions, he had only occasionally to make small purchases. He had no expensive tastes or habits, and seems to have spared all superfluous expense in order to give substantially the whole of his wages to his parents. His provisions would probably cost his parents about 10s. per week. In the result, his contributions to the upkeep of his father's home was probably not far short of £1 10s. per week. We are not called upon to look exclusively either at the estimated requirements of the case, or at the estimated contribution, and we do not overlook the fact that the contribution, in fact, enabled the claimant to pay some back debts and to save a small sum. What we have to consider is the whole of the relevant facts as bearing upon the measure of compensation laid down by the Act. The General Manager of Railways offered £100 by way of compensation, together with £32 11s. 7d., representing the whole sum claimed for expenses in connection with the death, funeral, attendance at inquest, &c. The £100 was stated to be the customary sum paid in such cases. The General Manager's letter did not suggest that it was based upon any particular computation, and we think that the letter shows that the Department did not appreciate the extent to which the deceased's wages contributed to his parents' support. In this proceeding the Department simply submits to an assessment of compensation. Our duty is to find and assess "such sum . . . as may be determined on under this Act to be reasonable and proportionate to the loss or damage suffered by the said dependants."

The statute does not profess to afford any other guide to the amount than that quoted, save a maximum limit with which we are not presently concerned; but it must be remembered that the contribution must have reference to the life of the dependant. We have considered the whole question very much as a jury would be expected to consider it, in the light of the facts and figures quoted, the age, condition, and family surroundings of the claimant, and of the possibility of deceased marrying and reducing the contribution—and in the light of the case of *Simmons v. White Bros.* (68 L.J. Q.B.D. 507; 1899 1 Q.B. 1005) and *Main Colliery Company v. Davies* (69 L.J. Q.B.D. 755; 1900 A.C. 358), and the decisions of this Court in *Reid v. Lady Charlton Gold-dredging Company* (1 Decisions W.A. Act 10) and *McClusky v. The Success Gold-dredging*

Company (*Ibid.* 25). In the result we think that a fair amount to be allowed is £260, which sum we award to the claimant, with costs £15 15s., witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated the 10th day of November, 1904.

FREDK. R. CHAPMAN, J., President.

() WILLIAMS v. THE MAYOR, COUNCILLORS, AND CITIZENS OF DUNEDIN.

In the Court of Arbitration, Otago and Southland District (Dunedin).—John Williams, claimant, v. The Mayor, Councillors, and Citizens of the City of Dunedin, respondents.

Mr. Barclay for the claimant; Mr. Sim and Mr. J. R. Sinclair for the respondents.

JUDGMENT OF THE COURT.

CLAIMANT, who was a stonemason, was employed dressing pitchers at respondents' quarry at Woodhaugh, to be used in the construction of tramway-tracks, when he received a blow from a splinter of stone, by which ultimately he lost an eye. Claimant was employed at 1s. 6d. per hour, and was subject to be discharged at any time, and might leave at any time. He commenced work on Tuesday, the 4th August, 1903, and worked until Friday, the 14th, when he was injured at the close of the day. It was well known to him and all the other employees that the Corporation pay-week or week of work begins on the Thursday and ends on the Wednesday night. Claimant did not work on Saturday, the 5th, but went on Friday, the customary pay-day, and got his cheque to the end of the pay-week. He received the other two days' pay after he came out of the hospital. During the whole period, working eight or eight hours and a half per week-day, and four hours on Saturdays, claimant earned £5 16s. 3d. Had he worked that Saturday he would have earned 6s. more. Claimant is a very old man, and was said to be very slow, turning out only about half the proper quantity of pitchers, and the assistant engineer, Bowman, decided to dispense with his services. He says that after looking at claimant's work on Friday, he gave directions to the foreman quarryman to dismiss him "at the end of the week," or "at the end of the calendar week," by which he meant on the following day, not on the following Wednesday. Norris, the foreman quarryman, says that he told claimant that his services were no longer required after Saturday. Claimant denied this, but he was so extremely deaf that it is quite possible that it was not made clear to him. We think, however, that this is immaterial, because, in order to elucidate the question whether the claimant,

thus casually employed, had a prospect of continuous employment, it is unnecessary to do more than ascertain the intention of his employer, if he had actually formed any, and we think that there is sufficient evidence to show that claimant had no prospect of employment beyond Saturday, the 15th. On that day he called at 12.30 p.m. at the respondent's pay-office for an order for the two days' pay, which was given to him by Norris. Norris knew nothing of an accident. He said that claimant had a handkerchief wiping his eye, but he always had a sore eye. In these circumstances it was not unnatural for Norris to assume that the employment closed in consequence of the intimation given by him to claimant. We think, however, that as there was a prospect of claimant working for four hours on Saturday, 6s. ought for the purpose of computation to be added to the sum actually earned by him.

The question in controversy was how the average weekly earnings were to be computed. There was no suggestion that the claimant had recovered, or was entitled to less than half his average weekly earnings. The claimant had worked in two calendar weeks; the respondents contended that his total earnings ought to be divided by three, as he had worked in three Corporation pay-weeks; the claimant's counsel contended that the time worked must be taken to be a week and a half, giving as the weekly average the sum earned in six days. This involved a discussion as to the effect of *Lysons v. Knowles* (1901 A.C. 79), and a consideration of the applicability to this case of the principle of *Public Trustee v. Zimmerman* (6 Gaz. L.R. 231), decided on the 23rd January, 1904. In that case we decided that when a man employed by the hour had worked first a broken week, then twenty-one whole weeks, and then a broken week in which he was killed, and there were substantial reasons for thinking that, but for his death, he would have worked to the end of the week, the proper way to compute his average weekly earnings was to reject the second broken week, deduct from the total earnings the sum earned in that week, and divide the sum remaining by 22. This rule was adopted as substantially equivalent to the alternative of treating the last broken week as a hypothetical week, extending it to the end, and then dividing the whole by 23. The former alternative was preferred, however, as eliminating a source of error or uncertainty due to the fact that regular hours were not worked, and the value of the hypothetical week could only be computed by a somewhat elaborate method, which could not be free from minute error. In the *Public Trustee v. Zimmerman* we expressed a slight doubt as to whether we ought not to have rejected the first broken week and the sum earned during it as well, and divided what remained by 21. We are now called upon to deal with a somewhat similar, but not exactly similar question. In that case the matter which we left in doubt was unimportant. In this case a similar question becomes important, because of the shortness of the total time worked, and the consequent smallness of the total earnings. We think that the question now to be determined is in a measure

covered by authority, and that a proper application of the rules recognised in *Ayres v. Buckeridge*, and the cases decided with it (1902 1 K.B. 57), and of the principle of the case of *Watters v. Clover, Clayton, and Co.* (18 Times L.R. 60; 4 W.C.C. 138), assists us to settle it. This last case proceeds upon the assumption that the Court is not necessarily bound to the trade week, but is entitled to ascertain the average weekly earnings by reference to what may be termed the common-sense standard. There, the claimant worked for six continuous days, and was then injured. The trade week began on Friday morning and ended on Thursday night, Saturday being pay-day. Claimant was on Saturday paid 14s. for two days' work. For the other four days he received £1 18s. 6d., some of which represented overtime. It was contended that the total earnings, £2 12s. 6d., must be divided by 2, as claimant had worked in two factory weeks, but the Court of Appeal refused to adopt this contention, holding that there was material from which the Court might deduce an average from the six days worked, as there was nothing to show that the second week might not have been completed. Collins, M.R., says, "It made no difference whether the six days were the whole of one week or whether they were parts of two weeks. Neither was it material for this purpose whether the two weeks, if there were two weeks, were trade weeks or calendar weeks." Here, as we have said, there would be nothing to justify a conclusion that the work would have continued beyond the Saturday, but we think that the passage quoted justifies us in taking a week of six days as our factor, and the remainder of the time worked as part of another, thus treating the money earned as earned in two weeks. Mr. Barclay asked us to disregard the broken week, and to treat a whole week as ascertaining the claimant's average. To do so would be to go beyond either the English or the Scotch decisions, and to disregard the authority of *Lysons v. Knowles*. If the claimant had been actually engaged for a definite period equivalent to that worked together with the following Saturday, a fair view of his average weekly earnings would have been to treat the whole sum earned as having been earned in two weeks, irrespective of any particular mode of interpreting the expression "week." We do not see any good reason why this mode of computation should not be used here.

This view is not in accordance with the Scotch decisions, which rigidly adhere to the trade week (*Fleming v. Lochgelly Iron and Coal Company (Limited)*: 4 F. Ct. of Sess. 890), and equally rigidly adhere to a particular interpretation of the judgment and order in *Lysons v. Knowles*, which excludes the idea of a hypothetical week (*Grewar v. Caledonian Railway Company*: 4 F. Ct. of Sess. 895; 39 Sc. L.R. 689). (*McCue v. Barclay, Curle, and Co. (Limited)*: *Ibid.* 909.) The rule thus laid down has been consistently followed by the Scotch Courts, while the rule adopted in England has been as consistently followed there in *Ayres v. Buckeridge*; *Wheale v. Rhymney Iron Company*; *Jones v. Rhymney Iron Company* (1902 1 K.B. 57), which appear to us to give direct support to what we

propose to decide in this case. In one of the latest cases in the Court of Sessions (*Campbell v. Fife Coal Company*: 5 F. Ct. of Sess. 170), the rule adopted in Scotland is reaffirmed on the authority of *Fleming v. Lochgelly Iron and Coal Company*; there, doubts were expressed by some members of the Court as to Fleming's case, but, as it was a considered decision of the First Division, it was authoritative. Mr. Lord Justice Clerk said, "It is quite plain that the decision in that case was arrived at after a full discussion, and, as it fixes a rule, it is desirable that there should be uniformity. In these circumstances I see no reason whatever for going contrary to that decision." Lord Trayner, after having decided differently in the *Cadzow Coal Company* case (1900 3 F. Ct. of Sess. 72), decided before Fleming's case, says, "I have not changed the opinion expressed formerly, but, in deference to the decision of the First Division, I am willing to surrender that opinion. That decision fixes a rule, and it is material that a rule should be fixed, while it is not so material what that rule is." Lord Moncrieff also expresses some doubt as to Fleming's case, and adds, "But that being a distinct decision on the point, I am not prepared to decide differently."

We are not absolutely bound by the rule of any other Court, but we have thought fit to quote these expressions as showing that these eminent Judges fully appreciate how open a question it is, and, while not bound by the decisions of these Courts, we consider it very desirable that we should abide by such a rule as to us seems most nearly to express the intention of our Legislature, and for this somewhat lengthy discussion, this conflict of opinion and our desire to arrive at a consistent rule is our justification. On the whole, we prefer the more elastic rule adopted by the English Courts. Either is liable to lead to results which may appear capricious, but this tendency is reduced to a minimum by reference to the authorities on which we rely. The question is one of adherence to the decision of the House of Lords in *Lysons v. Knowles*, to which all the Courts profess to adhere. As that was a case in which two isolated days were worked under conditions showing that they represented not merely casual, but precarious employment (as in *Reddie v. Mayor, &c., of Balclutha*: 1 Dec. W.C. Act. 13), we do not think that we are in any way departing from the order in that case, and that we are acting in accordance with the reasonings of their Lordships, as expressed in the judgment with reference to the expression "average," in holding, as we now hold—namely, that the total sum earned was earned in a week of six days, and a second week to be treated as a hypothetical week, in which five days would, but for the accident, have been worked, and that in this view the sum of £6 2s. 3d. must be divided by 2, that the average weekly earnings are thus ascertained to be £3 1s. 1½d., upon which footing we award the claimant the weekly sum of £1 10s. 6d., to be paid to him (subject to payments made) from the date of the accident until the amount is redeemed, ended, or diminished in accordance with the provisions of the Act. We award the claim-

ant £7 7s. costs, with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated the 10th day of November, 1904.

FREDK. R. CHAPMAN, J., President.

(37.) *RE WORKERS' COMPENSATION FOR ACCIDENTS.*

Claim by an employer against a person who injured his employee (Claim upheld.)

THE following decision was given in the Supreme Court on the 14th June, 1904, by Mr. Justice Williams (N.Z.L.R., Vol. xxiii, p. 745):—

SMAILL *v.* ALEXANDER.

Master and Servant—Injury to Servant—Loss of Service—Damages—Medical Expenses.

In an action by a master against a person who has injured his servant the expenses of medical attendance on the servant may be recovered as part of the damages for loss of service.

APPEAL from the decision of George Cruickshank, Esq., S.M., at Gore.

On a counterclaim for damages against the respondent for loss of service by reason of the respondent assaulting and grievously injuring appellant's servant to such an extent that he was unfit to attend to his occupation, and for expenses incurred by the appellant in procuring surgical assistance for his servant, the Magistrate gave judgment for £3 for loss of service, but refused to allow the expenses in connection with the surgical assistance. From this decision the appellant now appealed.

Sim for the appellant:—

The judgment of the Magistrate is based on the fact that there is no legal obligation on the master to procure medical attendance for his servant. There is no authority for such a proposition. Dixon *v.* Bell (1 Stark 287) and Flemington *v.* Smithers (2 C. & P. 292) are cases where the master was held to be entitled to recover: Mayne on Damages (6th ed. 113); Smith's Master and Servant (5th ed. 144); Eversley on Domestic Relations (2nd ed. 862). The American authorities on the subject take the same view: Wood's Law of Master and Servant (2nd ed. 449); Sedgwick on the Measure of Damages (7th ed. Vol ii 549). In Hodsoll *v.* Stallebrass (11 A. & E. 301) the master was held entitled to recover prospective damages. The Magistrate has misconstrued a passage in Pollock on Torts (5th ed. 64). The question here is not one of measure of damages, but of whether an action will lie at all.

[WILLIAMS, J.: Is the master bound to give the servant notice in order to mitigate damages?]

No; it is the master's duty to mitigate damages by adopting treatment such as appellant has done in this case.

Veave, for the respondent:—

The master is not liable to pay for medical attendance and comforts unless under some contract: *Wennall v. Adney* (3 B. & P. 247, 253); *Reg. v. Smith* (8 C. & P. 153). In all the cases quoted as authorities for the appellant the relationship is that of parent and child. In *Alton v. The Midland Railway Company* (34 L.J., C.P. 292, 296) it is doubted whether a master can even recover for loss of service. See also *Hall v. Hollander* (4 B. & C. 660).

Sim, in reply:—

It is true that the authorities are all cases of parent and child, but even in these cases the parent can only recover on the ground of loss of service: *Pollock on Torts* (5th ed. 223).

Cur. adv. vult.

WILLIAMS, J.: If an action by a master against a man for injuring his servant will lie at all I see no reason why, if the master pays the doctor's bill, he should not be able to recover it from the wrongdoer as part of the damages. That he can recover it is laid down in every text-book that deals with the subject. It was because of the loss of service, and not because the person injured was the son of the plaintiff, that the damages were given in *Dixon v. Bell* (1 Stark 287). The ordinary action for seduction is founded on loss of service. The action can be brought by a parent although the daughter was a married woman separated from her husband: *Harper v. Luffin* (7 B. & C. 387). It can be brought where the daughter is over twenty-one, where she is an adopted child only, and by a master who is no relation to the servant seduced: *Forbes v. Wilson* (3 Peake N.P. 77). In none of these cases would there be any legal liability upon the master to supply medical attendance to the girl seduced, yet there can be no doubt that in every action for seduction the expenses of such attendance are recoverable, and they are recoverable on the ground that the relation of master and servant existed between the plaintiff and the girl. The test whether such damages can be recovered is not whether the master is legally bound as between himself and his servant to find medical attendance for his servant, but whether the incurring by the master of the liability is the natural and reasonable result of the defendant's act—that is, that it is such a consequence as in the ordinary course of things would flow from the act: *Mayne on Damages* (7th ed. 49). Now, if a man grievously injures one whom he knows to be another man's servant, so as to render him unable to render service, he does a wrong to the master as well as to the servant. That a doctor will be sent for by one of the parties wronged is a reasonable result of the act of the wrongdoer. The employer may not be legally bound to send

for medical attendance, but it is quite natural and reasonable that he should do so. The employer has a right to the services of the injured man, and in his own interests, and apart from any motives of humanity, he may be expected to do what he can to regain those services as soon as possible. If he takes reasonable steps to regain those services he can recover the cost from the wrongdoer, and to obtain medical attendance in the case of serious injury is a reasonable step. The master who sends for the doctor to attend his servant cannot, in the absence of special contract, deduct the amount he pays the doctor from the servant's wages: *Sellen v. Norman* (4 C. & P. 80). If the master in the present case could not recover, it would follow that the wrongdoer would not be liable to anybody for the costs of medical attendance on the man he had injured. The injured man could not recover it, because he had never paid it, and had never become liable for it. In my opinion the plaintiff by counterclaim can recover the sums for medical attendance and medicine for which he has become responsible, and is entitled to judgment for £47 13s. 6d., the admitted amount. Judgment will be entered for that amount, in addition to the £3 given by the Magistrate; and £6 6s., costs of this appeal, will be paid by the respondent.

Solicitor for the appellant: E. R. Bowler (Gore).

Solicitor for the respondent: J. S. Neave (Gore).

FILED IN JANUARY, 1905.

WELLINGTON INDUSTRIAL DISTRICT.

(38.) MORRIS AND WIFE *v.* WILLIAMS AND BEETHAM, McHATTIE AND CO., C. E. DANIELL, HENRY GOLDER, WILLIAM THOMAS, AND FRANK PRICE.

In the Court of Arbitration, Wellington District (Masterton).—William Morris and Wife, claimant, *v.* Williams and Beetham, of Brancepath, sheep-farmers; Messrs. McHattie and Co., of Taueru, sawmillers; Charles Edward Daniell, of Masterton, sawmillers; and Henry Golder, William Thomas, and Frank Price, of Weraiti, sawmill contractors, respondents.

Mr. Pownall for the claimants; Mr. Hollings for Williams and Beetham, McHattie and Co., and Daniell; Mr. Dolan for Golder, Thomas, and Price.

JUDGMENT OF THE COURT, DELIVERED BY CHAPMAN, J. (PRESIDENT).

CLAIM under "The Workers' Compensation for Accidents Act, 1900."

The claimants were the father and mother of deceased, George William Morris. Deceased was engaged by Golder, Thomas, and Price, and had been in their employment for some years as a bush-feller, his duty being to fell trees to be converted into logs, carried to a mill, and reduced to timber by these three respondents. His death was undoubtedly caused while felling a tree by an accident arising out of and in the course of his employment.

The position of the several respondents was somewhat unusual, as they constitute four successive parties, thus: (a.) Williams and Beetham as partners in a sheep-farming business, and on their land is a large area of bush, in felling part of which the accident happened. (b.) McHattie and Co. are sawmillers, who contracted with Williams and Beetham to cut the timber trees out of this bush, and convert them into merchantable timber on agreed terms, and sell it for Williams and Beetham. (c.) Daniell took a sub-contract with McHattie and Co. to cut out a limited portion of this bush on agreed terms, McHattie and Co. retaining the principal contract and working with another mill at another part of the bush. (d.) Golder, Thomas, and Price took a similar sub-contract under Daniell. This contract was varied from time to time, and the price was raised as more work was added to the duties undertaken

by them. Originally this contract was with Golder and Thomas, who were sawmillers, but Price joined when the additions of a bush expert was required, that they might undertake the whole work.

All these arrangements were apparently verbal, excepting, perhaps, the first, and no particular evidence was given respecting them save the last, which was embodied in a specification drawn up by Daniell when calling for tenders. The first contract was not in evidence, but the same counsel appeared for the first, second, and third parties, and made no special reference to any difference between them. The specification, dated 30th November, 1898, was headed, "Specification of work to be done in contract for milling timber at Weraiti sawmill."

The principal conditions were: "Contractor to cut timber in bush in such a way as to secure the most timber from bush, and to the satisfaction of owners of bush. Contractor to find all necessary saws and axes; to make all tramways required to bring logs to mill; to take all and every reasonable care of bullocks and horses; to shoe horses. In mill: To cut in clean marketable manner all timber as ordered and required by proprietor (Daniell), and load timber on to trucks ready to be removed or into planing-shed, as may be required. To provide themselves with files and emery-stones. Contractor to properly shoe horses, and employ a competent engine-driver."

There were other provisions as to removing slabs from the mill, and a provision that "A representative of the company (Daniell) will be in charge, and his instructions must in all cases be obeyed. At all times the company will keep in repair bush tracks and chains, but the contractors are responsible for careful use of all plant, and will be held responsible for any damage done through carelessness or neglect."

It was stipulated that bullocks, horses, yokes, and appliances, including tramway logging - appliances, repairs, and horse - feed, should be provided by Daniell. He reserved himself the right to terminate the arrangement on giving one week's notice. A price was on this footing agreed to at per 100 ft.

Though it is sometimes difficult to determine whether a person is a contractor or a servant (Beven on Employers' Liability and Workers' Compensation, 280; McIntosh's case, *N.Z. Labour Journal*, Vol. xii, p. 880), we are satisfied that the relation of master and servant did not exist between the first and second, the second and the third, and the third and the fourth of the parties. The only thing to suggest this is that there was no determinate area of bush which the successive contractors had bound themselves to cut out, except possibly in the case of the first and second parties. This circumstance is, however, insufficient alone to determine the question. It was assumed that the whole control of the operations passed to the successive sub-contractors, except in so far as it was expressly reserved to the superior contractor. Looking at the whole

of the provisions of the specification, and the degree and kind of skill required to perform the successive duties undertaken, we conclude that what would in popular language be called a contract was not a mere agreement for personal service at piecework rates, but that it was a contract to convert a quantity of standing forest into marketable timber, and that a chain of contractors and sub-contractors is established through these parties as contemplated by section 15 of "The Workers' Compensation for Accidents Act, 1900." The question is important, because, had the relation of master and servant been established, it would have resulted in discharging McHattie and Co., Daniell, and possibly even Golder, Thomas, and Price from liability.

The next question raised was whether within section 15, subsection (3), the work to be executed under the contract in which the worker was employed (a) related directly to the land or other property of Williams and Beetham, or (b) was a part or process in their trade or business. We think that it fulfils both these conditions. The land was their land, and the trees were either part of the land or were "other property" of a closely related nature; moreover, the timber when produced and marketed was their property, so that the production of it was their trade or business, and the whole process from the felling of the trees to the selling of the boards was a process of their trade or business, as it certainly was a process in the trade or business of each of the subsequent parties.

Then it was argued that Golder, Thomas, and Price were not really the employers of deceased, as they only acted for the principals. This is partly disposed by the finding that they were sub-contractors; but, quite apart from this, the evidence is all one way to show that they and they alone hired and paid Morris, and that Daniell knew nothing about him. It is quite certain that Daniell was only bound to pay them the agreed rate, and that he could not have been sued by Morris had they failed to pay his wages. It was suggested as an admission that Daniell had included Golder, Thomas, and Price and all their employees in his statement of labour employed when effecting an accident assurance. This only shows that he covered all risks connected with the work of all these men; the relationship between the parties stands upon undisputed evidence.

It was argued with much ingenuity by Mr. Dolan that bush-felling was not within either subsection (1) or subsection (2) of section 4, and that it was not "forestry" within section 5 of the amending Act of 1902. This latter contention may be conceded, as "forestry" here referred to is referred to as an extension of agriculture, and must be limited to processes having some analogy to agriculture. It has been decided by this Court (*Bunning v. Omundsen*, 1 Dec. W.C.A. 24) that what is in this country called "bushfelling" is within subsection (1), and we find no reason to dissent from that case. That was a case of bushfelling merely for the purpose of getting rid of the bush. The matter becomes clearer when it is considered that what deceased was employed on was not

merely felling a tree, but was part of a process involved in an "industrial" and "manufacturing" work, which in this case commenced at the felling of the tree and ended in the turning out of the manufactured timber, and that all the successive parties were engaged in the whole or important parts of the complete process.

We are further of opinion that the work in this case falls within subsection (2). The rule that general words are to be construed as relating to matter *ejusdem generis*, with particular words which precede them, must not be carried too far: *Reg. v. Edmundson*, 2 E. & E. 77; *Reg. v. Payne*, L.R. 1 C.C.R. 27; *Skinner and Co. v. Shaw and Co.* (1892) 1 Ch. 413. It is to be noted that the four particular words, "mining, quarrying, engineering, building," are not of one genus, save that they relate to processes having industrial objects and are generally connected as hazardous work. The first two may be said to describe destructive processes not wholly unlike that of felling trees, while at least one of the others—namely, "building"—describes a process more unlike mining and quarrying than tree-felling is unlike those operations. We therefore consider that we ought to adopt what is presumably the popular view of this clause, which we are satisfied is the view contemplated by the Legislature, and accordingly hold that the deceased was engaged in "other hazardous work."

The proof of the dependence of the claimants was supported to some extent by documentary evidence, but we do not think that it showed that more than about £18 per annum could be relied on. The evidence on this part of the case was somewhat unsatisfactory; but, so far as it went, a clear case was made out, and on the part of the son there was an apparent willingness to recognise his duty towards his parents, who were still able to earn something.

We award £75 to be paid to the claimants on their joint receipt, and declare this sum and the costs to be a joint and several liability of all the respondents. We allow £12 12s. costs, witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated the 29th day of November, 1904.

FREDK. R. CHAPMAN, J., President.

(39.) VOLLHEIM v. BUICK.

In the Court of Arbitration, Wellington District (Masterton).—
Elizabeth Vollheim, claimant, v. William Buick, respondent.

Mr. Hollings for claimant; Dr. Trimble for respondent.

JUDGMENT OF THE COURT, DELIVERED BY CHAPMAN, J. (PRESIDENT).
CLAIM under "The Workers' Compensation for Accidents Act, 1900."

The total dependence of the claimant, who was the widow of the deceased, was clearly proved, and it was admitted that the rate of

wages was such that no more than the minimum of £200 could be recovered.

The sole remaining question was whether a defence thus stated was available. "No question has arisen for the determination of the Court, all questions arising out of the accident to the deceased having been settled by agreement between him and the respondent during the deceased's lifetime."

The accident happened on the 26th September, 1903, deceased being injured by being thrown out of a cart. About a month after this the deceased and the respondent agreed that the latter should pay the former £5 in respect of the accident. No express words were proved to have been used, but it may be taken that at the time neither party suspected the real extent of the injury, or in the least degree foresaw its danger to deceased, and it was assumed that this was a reasonable sum to cover his claim. He died on the 12th January, 1904. It was admitted that death was the result of the accident. Counsel were unable to refer us to any case deciding whether a compromise so effected bound dependants in the event of the injured man subsequently dying, and we are not aware that such a case exists.

We gather, however, from the wording of the schedule to "The Workers' Compensation for Accidents Act, 1900," and from sections of the Act itself, that the Legislature did not contemplate that the claims of dependants should depend on the claim of deceased, but regarded them as distinct, though not wholly independent, claims. The worker's claim depends on conditions prevailing at the time of and before the accident, while that of the claimant, in case of his death, arises with reference to the state of affairs at the date of that event. It is even conceivable, though not probable, that a person who was not in a position to come forward as a claimant at the date of the compromise might be perfectly entitled to make such a claim at the date of the death. An injured man might marry, or his dependants might become impoverished in the interval. It is further quite conceivable that the dependants might be infants when the claim was compromised, or might even be unborn. The Legislature did not intend that the claims of such persons should be defeated or released by the injured man, as the Act is not merely an Act to adjust the claims between master and servant, but is an Act proceeding from the policy of the State to provide compensation for dependants. The third case (c) in the Second Schedule is apparently intended to protect any stranger who may incur expense in supplying medical attendance to, or in burying a man who has no dependants and is killed by accident. (Minton-Stenhouse, "Accidents to Workmen," 2nd ed. 1902, p. 205.) It was not intended that this should be controlled by the deceased, and this throws some light on the position of claimants under the preceding paragraphs.

It is further to be noticed that section 12 of the Act treats the claim in respect of injury and that in respect of death as totally

distinct, and fixes entirely different periods of limitation in respect of them. The period in respect of the injury may have expired before that in respect of death has begun to run. If an award of weekly payments had been made in favour of deceased, there seems to be no doubt that, in the event of his death from the accident, his dependants could recover, but would have to give credit, by reason of the proviso to clause (a), for weekly payments already made. (*O'Keefe v. Lovatt*, 18 T.L.R. 57.) This feature appears to indicate the only interdependence of the two classes of claim. There is no reason why the same result would not ensue if the weekly payments had been acknowledged and paid without arbitration.

This makes it reasonable that we should construe the expression "weekly payments" as equivalent to "payments." Were it otherwise, obviously inequitable results would follow. The claimant's counsel did not suggest anything to the contrary, but the use by the Legislature of this limited expression was observed upon by respondent's counsel as part of his argument.

We award the claimant the sum of £200, less £5 paid to deceased, together with costs £7 7s., witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated the 29th day of November, 1904.

FREDK. R. CHAPMAN, J., President.

OTAGO AND SOUTHLAND INDUSTRIAL DISTRICT.

(40.) HARBOUR *v.* FERGUSON AND MITCHELL.

In the Court of Arbitration, Otago and Southland Industrial District (Dunedin).—Henry Harbour, claimant, *v.* Ferguson and Mitchell, respondents.

W. L. Moore for claimant; W. Sim for respondents.

JUDGMENT OF THE COURT, DELIVERED BY CHAPMAN, J. (PRESIDENT).

THE claimant, the legal personal representative of John Harbour, claimed that he and his wife were dependants of John Harbour, who died from the effects of an accident arising out of and in the course of his employment as a labourer at respondents' paper-mills, which happened on the 5th February, 1903, the deceased dying on the 19th February, 1903.

The claimant is the father of deceased, and was described as a dairy-farmer. The principal matter in dispute was the dependence.

Deceased had in the previous three years earned £283 16s. in respondents' service. It was suggested by the claimant that a new equivalent to this should be applied thus: £19 12s. in payment of funeral expenses, and the balance for the joint benefit of the father and mother.

The question to be determined arises upon the following statement of facts which were very candidly explained by the claimant: Claimant had a small farm in McGlashan's Valley, worth £1,000, in addition to which he had cows, carts, and horses worth £150. The farm was subject to a mortgage of £300, carrying £16 10s. interest. Since the death of deceased claimant had let the farm to two sons for £60 per annum; this included adjoining land received from deceased's son's estate. He considered that his own farm was worth about £45 per annum by itself, but this did not include the dwellinghouse which he had reserved, and in which he lives (worth perhaps 6s. or 7s. per week), to which was attached a garden in which he could work and make £10 or £12 per annum by selling fruit. The son earned £1 16s. per week. He lived with his parents, paying 15s. per week for his board, and gave a considerable amount of help with the cows. It may be assumed that the board money paid would leave a profit of about 5s. per week, while an equivalent for the assistance rendered might be obtained by hiring a boy for part of the day at 5s. or 7s. 6d. per week. The son died intestate, and the claimant received from his estate land and money (the proceeds of an insurance policy) to the net amount of at least £550. The deceased had bought or built a cottage near to the place where he worked, and contemplated marrying and living there. While the deceased was living with the father the latter had saved £50; this fact was relied on as showing that the claimant was in one way or another in receipt of more than his keep. It was the death of his son and the consequent loss of his personal services that caused claimant to let the farm, but it may be assumed that the son's marriage would have led to the same result. Other sons occasionally gave a hand about the place, but are not stated to have contributed anything in money. The claimant is sixty-three and the wife sixty-five years of age, the former not past work.

Looking at the contingency of the son marrying, it may be assumed that the income from his estate approximately replaces the pecuniary and personal assistance given by him while applying the capital for the support of the parents; it certainly more than replaces that assistance, as a joint annuity for the lives of both parents in excess of the value of these contributions could be purchased for far less than the sum left by him. In these circumstances the question is whether a claim in respect of partial dependence arises. We are of opinion that it does not. The first clause of the Second Schedule (clause *a*) fixes the amount of compensation for a person who is wholly dependent arbitrarily. The Court has only to find the fact of total dependence on deceased's earnings, and ascertain the average weekly earnings, and the statute does the rest. The second clause (clause *b*) is different. Under it, if there are no total dependants, but only partial dependants, then a sum has to be found by the Court. This is to be "such sum . . . as may be determined on under this Act to be reasonable and proportionate to the loss or damage suffered by the said dependants." It must be

borne in mind, that this is to measure not the loss in every sense by the death of the son, but the loss in respect of the dependence on his earnings. In this case no loss or damage in a pecuniary sense has been suffered. Were we to lose sight of this fact, we might be encouraging the view that this statute is something more than a compensatory provision; but it is manifestly an Act dealing with pecuniary compensation for pecuniary loss, both in the case of a claim by an injured worker and in the case of a claim by his dependants. These considerations, we think, let in the contention of respondents' counsel that the true measure of compensation is the same as in the case of an action under "The Deaths by Accidents Compensation Act, 1880," and its English equivalent, in which credit has to be given by the claimants for the fruits of an accident policy effected by deceased of which the claimants take the benefit. (See *Hicks v. Newport, &c., Railway Company*, 4 B. & C. 403; *Grand Trunk of Canada v. Jennings*, 13 A.C. 800; *Bradburn v. G. W. Railway Company*, L.R. 10 Ex. 1; *Greymouth - Point Elizabeth Coal Company v. McIvor*, 16 N.Z.L.R. 258.)

To realise how far a different view of the scope of the Act might carry one, a simple illustration may be put: A is dependent on B's earnings to the extent of £50 per annum. B is killed by accident, and by his will leaves A £100 per annum. Is A entitled to be compensated by B's employer? We are satisfied that he is not. If the annuity left were £50, he would not be so entitled; but if it were £25 he would be entitled to proportionate compensation. This case is very much like the suggested case of leaving £50.

Then, as to the position of the mother, so far as it has to be considered separately, it appears to stand thus: The husband is bound to support the wife in all events, and not merely in the sense in which children are liable to support their parents, if not otherwise provided for. Quite irrespective of her means, a husband has to support his wife under his own roof. Here the husband had the means of supporting his wife at least for a limited time, and was doing so, though in this he was assisted by his son in the manner described. The death of the son placed him in a pecuniary position which enabled him to continue this support more effectually than before. We think that the two cases have to be considered together, and that the husband's means of support must be considered to be the wife's means of support to the extent to which they reach, and in this case to the extent of being adequate.

We have been referred to the judgment of Cooper, J., in the Supreme Court case *Ashcroft v. Cable* (VI Gaz. L.R. 334), which is certainly opposed to the decision at which we have arrived. It is based on the English case of *Pryce v. Penrikyber Navigation Colliery Company* (1902 1 K.B. 221 85 L.R. 477; 4 W.C.C. 115). That case is a decision on the first part of the schedule only, and we are unable to agree that it applies to this case; and as there is no appeal from this judgment, its delivery has been delayed in order that the

President might consult several of the Judges on the point. The majority of them have expressed concurrence in the opinion here expressed.

It is somewhat remarkable that, despite the enormous number of cases decided under this Act, there is nothing in the English decisions to assist us. It would seem as if wage-earners who fall within the Act in the United Kingdom are not possessed of accumulated means sufficient to make it worth while to raise this question.

The case falls within the last clause (c) of the schedule, and we award the sum of £19 12s. for funeral expenses, with £5 5s., together with witnesses' expenses and disbursements to be fixed by the Clerk of Awards.

Dated this 23rd day of December, 1904.

FREDK. R. CHAPMAN, J., President.

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